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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-867

LOUISIANA POWER & LIGHT COMPANY, ET AL.,
Petitioner

versus

FEDERAL POWER COMMISSION

PETITION OF LOUISIANA POWER & LIGHT COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Louisiana Power & Light Company (LP&L) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in No. 72-1714, *Louisiana Power & Light Company, et al v. Federal Power Commission.*

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, at A-7) is not yet reported. The opinions and orders of the Federal Power Commission (FPC) (App. B, *infra*, at A-34 and A-77) are reported at 47 F.P.C. 245 and 1021.

JURISDICTION

The opinion of which petitioner seeks review was issued June 28, 1973. Petitions for Rehearing and for Rehearing En Banc were denied September 5, 1973. Stay of Mandate as to LP&L was issued October 10, 1973 to afford opportunity for review by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under the Natural Gas Act, 15 U.S.C. §717 *et seq.*, of natural gas pipeline facilities located wholly in one state, which facilities transport only gas produced in that same state and the gas thus transported is consumed wholly within that same state?

As an alternative question that would arise from accepting inaccurate assertions by the FPC to be facts, is Section 1(c) of the Natural Gas Act applicable to facilities used to transport natural gas received into those facilities from another person within the same state in which the gas is then wholly transported and ultimately consumed, and the facilities are subject to regulation by a state commission?

2. Whether the United States Court of Appeals for the Fifth Circuit erred in sustaining a conclusion by the Fed-

eral Power Commission that a gas pipeline corporation had transformed an intrastate gas pipeline into an interstate one through the unauthorized introduction into that pipeline of less than a substantial amount of interstate gas in the absence of substantial evidence on the record to sustain such a conclusion?

STATUTES INVOLVED

Both questions invoke interpretation of the Natural Gas Act, 15 U.S.C. §717, reproduced herein at P. A-1 of Appendix A and the Administrative procedure Act, 5 U.S.C. §§556 (d) and 706, reproduced herein at P. A-4 of Appendix A.

STATEMENT OF THE CASE

This case involves the jurisdictional status of a pipeline facility of United Gas Pipe Line Company (United) located wholly within the State of Louisiana in an area south of New Orleans to east of Baton Rouge known as the Green System East. For over thirty years the Green System East has been serving only intrastate customers, and has therefore been subject to the jurisdiction of the Louisiana Public Service Commission (Louisiana Commission) and not the FPC. But on October 1, 1970 United filed an application with the FPC for a Certificate of Public Convenience and Necessity, pursuant to Section 7(c) [15 U.S.C. §717f] of the Natural Gas Act, for authorization" to continue operating certain facilities and to continue rendering certain services heretofore treated as local or intrastate in character." In effect United was asking the FPC to take jurisdiction over pipeline facilities that had been theretofore considered to be and operated as intrastate facilities under the jurisdiction of the Louisiana Commission. The motivation of United in making this application was rather

transparent. As eloquently described by FPC Commissioner Carver in his Dissent to Opinion No. 610 dated February 9, 1972,[1] United was and is engaged in an effort to use the FPC's jurisdiction as a shield against contracts now deemed improvident, *i.e.*, more money could be made by selling the gas to new customers at higher prices.

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[1] I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contact in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, *Florida Parishes* was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed markets. But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ... FPC ..... (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding. My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

THE COMMISSION DECISIONS BELOW

In Opinion 610 issued February 9, 1972, Appendix B at A-34 herein, confirmed by Opinion 610-A issued April 7, 1972, Appendix B at A-77 herein, the FPC held that the Green System East had become interstate by reason of the infusion of interstate gas into the intrastate system.

THE COURT DECISION BELOW

The Court of Appeals for the Fifth Circuit sustained the FPC's finding on the ground that it had only a "limited review" of FPC determinations and that, when the FPC found that there had been an infusion of interstate gas into the Green System East and that such infusion was not minimal, it could not say there was no "reasonable basis" for the FPC's finding of jurisdiction although it was "almost certain" that the Court "would not reach the same conclusion as an initial matter."

REASONS FOR GRANTING THE WRIT

The issue presented by this case is of fundamental importance to the administration of the Natural Gas Act and to the utilization of the natural gas resources with which that Act is concerned. The decision below which conflicts in principle with prior decisions of this Court as well as a prior decision of another panel of that same court, would grant to the FPC jurisdiction over wholly intrastate facilities and would turn over to the FPC jurisdiction properly belonging to the Louisiana Commission to regulate and allocate the uses of gas being produced, transported and consumed wholly in Louisiana. Thus, the question of the utilization of that portion of the natural gas produced

in Louisiana and dedicated to Louisiana consumption — completely divorced and apart from the substantial majority of amounts of gas taken out of Louisiana for consumption elsewhere as allocated by the FPC — would be placed in the hands of a federal regulatory body less responsive to the needs of the State of Louisiana than is the Louisiana Commission. Additionally, if certain inaccurate assertions by the FPC are accepted as facts, as the Court of Appeals did by failing to apply the "substantial evidence" rule, then still another question of overriding importance to the administration of the Natural Gas Act arises: the question of first impression as to whether Section 1(c) of the Natural Gas Act is applicable to facilities used to transport natural gas received into those facilities from another station within the same state in which the gas is then wholly transported and ultimately consumed, the facilities being subject to regulation by a state commission. This question of interpretation of the Hinshaw Amendment is of national importance, there being literally hundreds of Hinshaw exemptions outstanding in such gas-producing states as California, Texas, Oklahoma and Louisiana to mention the prominent producing states, all of which Hinshaw exemptions are affected to some degree by the decision below.

In *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 721, 92 S.Ct. 1827 (1972), this Court considered the question whether the FPC had jurisdiction over the pipeline known as the Green System East of sufficient importance to grant certiorari to the Fifth Circuit. This Court held there that the question of the FPC's jurisdiction was within that agency's primary jurisdiction, subject to review under the Natural Gas Act. Petitioner LP&L now seeks that review.

THE SUBSTANTIAL EVIDENCE ISSUE

The decision of the Fifth Circuit sought to be reviewed is erroneous in several respects. It sustained a finding that the facility in question was subject to the jurisdiction of the FPC despite the absence of "the channel of constant flow" of interstate gas required under this Court's decisions in *Interstate Natural Gas Company v.* F.P.C., 331 U.S. 682; *California v. Lo-Vaca Gathering Company,* 379 U.S. 366; and *F.P.C. v. Amerada Petroleum Corp.,* 379 U.S. 687, and the Fifth Circuit's own decision in *Louisiana Public Service Commission v. Federal Power Commission,* 359 F.2d 525 (1966).

In so doing it also denied petitioner review under the Substantial Evidence Test applicable to proceedings under the Natural Gas Act by (a) applying the so-called Rational Basis Test and (b) predicating its opinion on documents not in the record which petitioner has had no opportunity to contravene. With respect to the former aspect of this error, the Court below has violated the test established by the Administrative Procedure Act, developed by this Court in *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474, and held applicable to FPC proceedings in *Gainesville Utilities v. F.P.C.,* 402 U.S. 515. With respect to the Commission's reliance on matters outside the record, the Court's sustaining their use is also inconsistent with the decision of the Court of Appeals for the District of Columbia in the *Texas Gulf Coast Area Natural Gas Rate Cases* [No. 71-1828] decided August 24, 1973, creating a substantial conflict between the circuits which must be resolved.

Although this Court did hold in *F.P.C. v. LP&L* that it was for the FPC to determine in the first instance its

own jurisdiction, the Court's opinion cannot be read as authorizing the Commission to depart from the law in making its determination. The applicable principle established by decisions of this Court is that one must examine "the anatomy of the pipeline system to discover the channel of constant flow" to see whether the gas in this channel crosses a state line at any stage of movement from wellhead to ultimate consumption. *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682; *Lo-Vaca*, supra; *Amerada*, supra. The channel of gas in the Green System East never crosses a state line.

Opinion No. 610 found that some of the Green System East gas flowed *from* that system out of the state (Paragraphs 36, 37 and 38). However, as there was not even a scintilla of evidence to sustain this finding by the FPC, which was a physical impossibility owing to the difference in pressure between the Green System and other facilities of United (Tr. 323-324, 556; and admissions by United's Messrs. Echterhoff and Belvin in No. 71-2550 of the Court of Appeals), the Court of Appeals did not sustain the FPC on this rationale but permitted the theory, also advanced by the Commission, that even the introduction of small amounts of interstate gas *into* an intrastate system was sufficient to transform that system into a jurisdictional pipeline. Apart from that theory being unsupported by the record facts[2] it cannot be sustained under this Court's

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[2]The principal basis for the FPC's conclusion that interstate gas was being infused into the Green System East derives from the circumstances existent at Points I and J of United's flow diagram Appendix C herein at A-98. The record before the FPC showed clearly that the same situation exists at both Points: The gas comes from the field to a gas processing plant (Getty Oil at Point I, Humble at Point J) and after being processed, i.e., removing hydrocarbons such as propane or butane, United takes delivery of the gas from the plant and places the gas into one of two lines — one that goes to the Black (interstate) System, the other that goes to Green System East (See the diagram, Exhibit 29,

decision in *California v. Lo-Vaca Co.*, 379 U.S. 366, 369, where it was held that federal jurisdiction was created by commingling of gas sold for consumpton intrastate with a *substantial* amount of gas to be resold in interstate commerce.

The Court below and the FPC have tried to avoid the impact of *Lo-Vaca* by stating that the amount of interstate gas involved is more than *de minimis*. But so labeling the minuscule percentage involved does not make it substantial, apart from the judicial fact that *de minimis* is an irrelevant doctrine here, the measure being the channel of constant flow.

Moreover, the percentages of interstate gas which the FPC stated were introduced into the Green System East were based upon its *ex parte* notice of the certain flow diagrams not in evidence and which neither petitioner nor any other party was given any opportunity to contravene. The reliance by the FPC on that extra-record "evidence" constitutes a denial of administrative due process by the Commission. The Court of Appeals for the District of Columbia, in *Texas Gulf Coast Area National Gas Rate Cases*, decided August 24, 1973, held that reliance by the FPC on evidence not in the record rendered its rulings unsupportable since the requirement of sub-

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reproduced in Appendix "C" hereto at A-98). There is no basis in this record for a conclusion of commingling.

As for Points L and M, any reliance by FPC on those situations runs afoul of its own witnesses (Tr. 323-324, 556) who testified that Green Gas could not get into the Black System because the Green System operated at a lower pressure than the Black System and there were no compressors on the Green System with which to lift the pressure so that it could enter the Black System. Additionally, such a conclusion by the FPC would render the whole proceeding before it an absurdity because the basic premise upon which United was supposedly required to infuse Black Gas into the Green System was the shortage of gas for the Green System. How then could the Green System be an exporter to the Black System as suggested by the FPC and seriously discussed by the Court of Appeals?

stantial evidence under the Natural Gas Act reflects a Congressional intent to limit agency determination to record evidence.

Texas Gulf Coast adds conclusive weight to Commissioner Carver's dissenting opinion in No. 610-A:

> "The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5) . . .
>
> "Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as as to interpretations of the record and notice data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, Sec. 556(d), U.S. Code and its judicial antecedents."

Even the Court of Appeals did not find that the Commission's Opinion and Order were supported by substantial evidence. Instead, it sustained the Commission on the ground of the so-called "rational basis" test:

> "Exercising our limited review as opposed to interpreting *de novo* we find we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See *Davis, Administrative Law Treatise* §30.05." Appendix B at A-23.

Davis § 30.05 explains the "Rational Basis Test" as a

device sometimes used by courts to avoid a determination of what is a question of fact and what is a question of law. That use preceded this Court's opinion in *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1950), which requires the courts to make a determination that there *is* substantial evidence in the record to sustain an agency's finding. Interpreting identical language to the Natural Gas Act in the Federal Power Act, this Court has held the FPC bound by the substantial evidence test. *Gainesville Utilities v. F.P.C.*, 402 U.S. 515. Judicial review of an agency's decision should consist of a finding that "it has a rational basis *and* is supported by substantial evidence." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962, emphasis added). Therefore, the Fifth Circuit's decision sustaining the Commission in the absence of substantial evidence is contrary to law.

THE HINSHAW ISSUE

The Hinshaw Amendment, Section 1(c) of the Natural Gas Act, was specifically designed to avoid the effect of *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266 (1949). That Amendment was designed to exempt from FPC jurisdiction *inter alia* (1) facilities used by (2) any person engaged in the transportation in interstate commerce of natural gas (3) received by such person from another person within or at the boundary of a State (4) if all the natural gas so received is ultimately consumed within such State (5) provided that the rates and service of such person and facilities be subject to regulation by a State commission.

Despite these five clear benchmarks, the Court of Appeals has devised a test of its own and named it the

"person-to-person requirement." It explained the requirement thus:

> "Thus, under §1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance."

Having explained this requirement, the Court below then concluded:

> "Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green — the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

Assuming the "person-to-person" requirement is correct, we submit that the Court of Appeals is clearly on the inescapable horns of a dilemma: Either the Green System is intrastate by reason of no Black gas being infused into it or, if Black gas is infused, then Section 1(c) is applicable.

Let us explain by reference to the record facts. In Appendix C at p. A-98 we have reproduced in detail the delivery situation at Point I, which detail is also applicable to Point J, these being the only relevant points of connection. Now, the record shows that the gas goes through the gas processing plants (which are owned by Getty Oil Company at Point I and Humble at Point J) which extract hydrocarbons (propane, butane, etc.) from the gas, and the gas is then delivered to United. If it be concluded that the delivery point is immediately upon leaving the Getty Plant (marked by us "Point of Entry"), then the gas is being delivered to United — a "person" — by Getty —"another person"— and the "person-to-person" requirement is obviously satisfied. On the other hand, if it be concluded that the delivery from Getty to United takes place after the gas passes through the 93' of separators, regulators, and meters (at the place we have marked "Point of Separation"), then there is no infusion of Black gas into the Green System. Under the requirement established by the Court of Appeal, either the Green System East is intrastate or it is entitled to a Hinshaw Amendment.

CONCLUSION

The decision of the FPC to transform a hitherto intrastate pipeline into an interstate one by fabricating injections of interstate gas that the record facts show to be non-existent is presently resulting in severe economic hardship to what some have described as "the Ruhr of America," the heavily industrialized area of the country running from Baton Rouge to New Orleans and, worse than that, it is causing hardship to the human needs Louisiana customers —homes, schools, hospitals—who have no alternative fuels available, such as coal and nuclear energy, in contrast to most other sections of the nation.

The Court of Appeals has failed in its review responsibilities, permitting the FPC to determine this serious case on the basis of *ex parte* extra-record material and upon a misconstruction of record facts. Additionally, the Court of Appeals misapplied the record facts to the statutory benchmarks of the Hinshaw Amendment.

This Court guaranteed in *Federal Power Commission v. Louisiana Power & Light Company* that the decision of the FPC would be reviewed pursuant to the Natural Gas Act. That review has been denied through the error of the Court of Appeals in abdicating its proper scope of review under the "limited review" theory. This Court now has the opportunity to make its guarantee good by granting our writ, and we submit that it should do so in the light of the national importance of this case to the energy crisis and to the orderly administration of the Natural Gas Act.

Respectfully submitted,

MONROE & LEMANN
Andrew P. Carter
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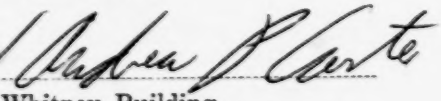
By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1973 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to all counsel of record for the parties.

s/ Andrew P. Vance

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Natural Gas Act, 15 U.S.C. §717

(Section 1)

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interestate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that

the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

Natural Gas Act, 15 U.S.C. §717(r)

(Section 19)

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall

deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order

such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646 § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.

Administrative Procedure Act, 5 U.S.C. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order

issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Administrative Procedure Act, 5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B—OPINIONS BELOW

Opinion of the Court of Appeal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and TEXACO, INC., and CITIES SERVICE OIL COMPANY, ET AL,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Revie wand Set Aside Opinions and Orders of the Federal Power Commission

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(June 28, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This case is another in the long-running and seemingly endless saga of "Who Gets The Gas?", starring the major oil companies, the natural gas pipelines, major industrial users of natural gas, and the Federal Power Commission. Also featured, albeit in some-

what of a bit part, is the individual gas consumer, "the little lady at the burner tip". Although possibly suited for short subject treatment, this proceeding has now become a full-length feature of epic proportions. Basically it is this court's task to consider petitions for review of FPC Opinions 610 and 610-A, in which the Commission took jurisdiction over a formerly intrastate pipeline in Eastern Louisiana. There are many parties with numerous underlying themes to present. From this confusion we must review whether or not the FPC correctly handed out the awards.

In Opinion 610, the FPC found that due to the injection of interstate gas, the formerly intrastate pipeline known as the "Green System-East" was now subject to FPC jurisdiction. Despite all the many different methods used by the petitioners in stating the issues, there are basically only two points for us to consider in reviewing the Commission: (1) Was the FPC correct in holding that the Green System-East had become sufficiently interstate to confer exclusive federal jurisdiction? (2) Even if the system would be otherwise an interstate pipeline subject to jurisdiction, had Congress expressly withdrawn federal jurisdiction for a pipeline such as this by enactment of the Hinshaw Amendment to the Natural Gas Act?

Also, in Opinion 610, the FPC found federal jurisdiction over United's Purple System, another formerly intrastate pipeline. While the majority of the petitioners challenge only the existence of federal jurisdiction over the Green System, two petitioners, Cities Service and Gulf States Utilities, challenge the characterization of the Purple System as interstate. The nature of each of these pipelines will be considered separately below.

The Green System-East

The Green System-East, a natural gas pipeline owned by United Gas Pipe Line Company, is physically situated entirely within the State of Louisiana in United's New Orleans division. For several years prior to October 1, 1970, when United filed an application for FPC certification for the Green System-East, these facilities had been operated as an intrastate system subject to the jurisdiction of the Louisiana Public Service Commission. At this point it is necessary to note that the Green System-East is connected through systems of valves with other pipelines, including United's Black System which is an interstate pipeline. It appears that all the gas which goes into the Green System-East is produced in Louisiana gas fields, although at some point some of this gas may be carried in pipelines which also carry gas dedicated to the interstate market. There exists a heated debate as to whether any gas once placed in the Green System-East can or does ever leave the State of Louisiana. These factual matters are basic to the holding of jurisdiction and will be considered in detail *infra*.

Prior Proceedings

The Green System-East has been involved in a significant chain of court opinions. Petitioner, Louisiana Power & Light, previously brought suit in the United States District Court for the Western District of Louisiana seeking a determination of the intrastate character of the Green System-East. The district court, 332 F.Supp. 692 (1971), dismissed the suit, holding that the issue of the nature of the Green System-East was within the primary jurisdiction of the FPC.

On appeal, we reversed the district court, disagreeing that it was necessary to await Commission action. *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326. This court went on to address the issue of the Green System-East's interstate character and held that any interstate gas which had been introduced into the system was so minimal in amount that federal jurisdiction had not attached.

In *Federal Power Commission v. Louisiana Power & Light Co.*, ____ U.S. ____, 32 L.Ed.2d 369 (1972), the Supreme Court reversed this court and agreed with the result reached by the district court. Noting that the FPC was conducting hearings of its own in this regard, the Court held that while the agency's decision would not be the last word, it must be the first. The FPC has now reached its decision, finding that the Green System-East is sufficiently interstate to be jurisdictional. It is that "first word" of the agency which we now must review and issue, if not the last word, at least the "next word".

I.

Before proceeding to the merits of the controversy, it is helpful to have a firm picture of the various parties engaged in this litigation and their respective interests in its outcome. It is also important to understand the practical effect of FPC jurisdiction on the parties.

The petitioners can be divided into basic groups. The major oil companies have an interest in the outcome both as sellers and purchasers of natural gas. Several smaller distribution companies which purchase gas from United and the Green System are also challenging the Commission decision. Of course, the petitioners include several state

regulatory agencies charged with the duty of regulating pipelines which are intrastate in nature. Public utilities which purchase natural gas for resale are involved as parties, as are various towns, parishes and municipalities, both as gas purchasers and representing the public interest. Basically, the effect of federal jurisdiction over the Green System-East will have a similar effect on each of these parties, although not to the same degree.

The petitioners, quite naturally, paint themselves as the heroes of this piece, denominating United as the villain and the FPC as conspiratorial bedfellow or, at the least, stooge of United. In giving depth to this characterization of United, the petitioners seek to show United as a greedy, over-reaching and somewhat callous corporate giant out to gorge itself at everyone's expense. The accuracy of this picture, they say, is made crystal clear by the results which will flow from FPC jurisdiction in this case.

These horrors which petitioners feel will flow from FPC jurisdiction are basically twofold. First, the switch from Louisiana Public Service Commission regulation, which, with regard to direct sales is virtually non-regulation, to FPC regulation will permit United to abrogate numerous long-term contracts which it has entered in the past for deliveries of gas to gas purchasers. The importance of this benefit can be seen immediately. Many of these contracts have several years yet to run. They were negotiated in the days when the supplies of natural gas appeared to be endless and, thus, contracts for extremely long terms, such as 20 years, were considered good business, sewing up a customer for the future. Of course, as we all know, with the rise of environmentalism which stressed the importance of natural gas as an essentially "clean" fuel and the realization that natural gas reserves and availability

have been drastically over-estimated, this country has been plunged into an "energy crisis". This "crisis" seems especially acute in the natural gas industry, possibly because of the greater demands for the fuel. Thus, what gas is available can be sold and indeed will be sold for substantially higher prices on today's market than a pipeline could realize under the old long-term contracts entered years ago. Even regulated prices would be substantially higher than the old contract rates, and it must be remembered that the FPC does not regulate the price of sales to direct customers such as large industries but only sales where ultimately the gas will be resold.

Secondly, the gas shortage has led to the necessary allocation of priorities and rationing of this limited supply of natural gas. Through what is popularly called "curtailment", pipelines are allowed to file, subject to Commission approval, plans of allocation of the available gas, basically to ensure that gas goes not to the highest bidder but to those who need it most in the public interest. FPC jurisdiction, thus, also brings in the almost certain result of curtailment of deliveries, even contractually agreed to deliveries. See *International Paper Co. v. Federal Power Commission*, 5 Cir. 1973, ____ F.2d ____ [No. 71-3531, slip opinion dated February 7, 1973].

The parties who sell gas to United for the Green System-East are also worried that if the Green System-East is held interstate they will be in a difficult contractual situation because the gas they are using to fill United's needs is restricted in many cases to the intrastate market only by contracts with those having the gas rights. Thus, they fear that they will have to use other gas to service the Green System-East.

Viewing this situation, the petitioners present United as out after the "fast buck". They allege that United was perfectly willing to be regulated, or in some cases not regulated, by the Louisiana Public Service Commission until it became evident to United that it was to its distinct financial advantage to come under FPC jurisdiction. They further suggest that to obtain Commission jurisdiction, United improperly and perhaps illegally injected interstate gas into the Green System-East, as it could do because of the interconnecting valves, solely for the purpose of creating an argument for jurisdiction to present to the Commission.

United, for its part, seeks to reverse these roles and cast itself as the "good guy". United presents a picture of greedy private industries wishing to gobble up all available gas for their own selfish use, to the detriment of other consumers and the public in general. United claims that any diversion of interstate gas into the Green System-East was because it was absolutely necessary to meet contract deliveries. United supports the Commission finding as in the best interest of the consuming public. Agreeing with United on this point, at least as far as its consumers go, is the Public Service Commission for the State of New York. New York intervened, alleging its fear that United would divert substantial amounts of gas dedicated to the interstate market, including New York consumers, to fill these Green System-East contracts unless the federal authorities exercised control.

Thus, the battle line is drawn and, as usual, the dispute is not over gas alone, but also money. In reviewing the Commission's opinion, we must put away these self-serving charges and countercharges and look to the legal issues of the requisites for federal jurisdiction. In light of the

Supreme Court's directive in *Louisiana Power & Light Co.*, supra, our task must begin with the FPC's decision.

II.

Opinions 610 and 610-A

The first question which the FPC faced in entertaining United's request was whether or not the Green System-East was indeed a jurisdictional pipeline. Noting that none of the interconnections at which United alleged interstate gas to have flowed into the Green System had been certificated by the Commission, the FPC stated that "the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the . . . facilities". In its presentation, United had marked a map of its system showing the points at which interstate gas had been injected into the Green System. The amounts of gas injected at each of these points, as found by the Commission, are set out in the margin.[1] Having found that gas which ultimately found its way into the Green System had at one time been transported in a pipeline which carried interstate gas even though all

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[1](b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated LiretteMobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

the gas was produced within Louisiana and had never physically been outside the state,[2] the Commission went ahead to decide whether or not the amount gave it jurisdiction.

The Commission found that the amounts involved were substantial and were sufficient to give the Commission jurisdiction. On peak days for 1970 and 1971 which were chosen, the Commission figures showed that 153,376 Mcf and 189,846 Mcf, respectively, flowed into the Green System-East. The Commission rejected a *de minimis* argument made by several of the petitioners stating that the interstate portion off the gas on peak days represented 7.79 percent of the requirements and on an annual basis, 2.39 percent of the requirement.[3] Several of the parties

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22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

[2]This is in dispute, but it is clear that some gas once carried in the Green System-East ends up in an *interstate* pipeline owned by Mid-Louisiana, but in all probability this gas does not physically leave Louisiana.

[3]Adjustments raise these figures to 10.7% and about 3.4%, respectively.

dispute these findings made by the Commission, especially the holding as to the total amount introduced into the Green System-East. We will discuss these points in more detail later in the opinion.

Viewing the total picture presented by all the various factors in the record before it, the FPC found that the Green System was an integrated part of United's interstate (or Black) system and that the Green System-East could no longer be left to state regulation as a purely intrastate pipeline. We note that the Commission somewhat retreated from its suggestion that Green System gas flowed out of the State of Louisiana in a physical form. In Opinion 610-A, the FPC stresses that its finding that Green System gas is introduced into Mid-Louisiana's pipeline is simply to show that it is commingled with gas which has moved in interstate commerce. This factor, according to the FPC, gives support to its holding that the Green System has become integrated with interstate systems even though the gas itself never flows out of the state.

The FPC went on to hold that jurisdiction was not to be determined by the amounts of gas involved. They held that jurisdiction attached wherever even an infinitesimal amount of interstate gas was injected into the system. For these purposes, the Commission defines interstate gas as any gas which had ever been carried in a certificated interstate pipeline.

Section 1(c) of the Natural Gas Act, commonly known as the Hinshaw Amendment, provides an exemption from federal regulation wherever all the gas received by the system is to be consumed wholly within the state. The

Commission refused to apply the Hinshaw exception, apparently finding that the Green System-East was an integrated facility and part of the United's total system.

Relying on *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and this court's Florida Parishes opinion, *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525, the FPC held that there had been sufficient commingling of intrastate and interstate gas to require that the Commission take jurisdiction over the Green System-East. The Commission also expressly rejected the argument that United had illegally and improperly introduced interstate gas into the Green System-East. First, it found the amounts injected were necessary to meet contract commitments, but, more importantly, stated the existence of jurisdictional facts controlled no matter what the motive.

Commissioner Carver dissented from Opinion 610. His primary reason for dissenting was his feeling that this circuit's opinion in *Louisiana Power & Light v. United Gas Pipe Line Co.*, 456 F.2d 326, which had not yet been passed on by the Supreme Court, was controlling and that the Commission was bound by *res judicata*. In his remarks, Commissioner Carver criticized the Commission for failure to take account of what he felt were the obvious reasons that United was now seeking Commission jurisdiction. He pointed out that the long-term industrial contracts were no longer beneficial to United because of the low rate structure and impending supply crisis. He also referred to the protected curtailment that United had previously sought from the Commission. See *International Paper Company v. FPC*, 5 Cir. 1973, ... F.2d ....., [No. 71-3531, slip opinion dated February 7, 1973]. He further stated:

> Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands.

Following the petitions for rehearing, the Commission issued Opinion 610-A. In this opinion, the Commission retreated somewhat from its conclusion that Green System-East gas flowed out of the State of Louisiana. The Commission also attempted to clear up several other statements in Opinion 610 which were questionable. Commissioner Carver again dissented. He points out that the retreat as to Green System-East gas flowing out of the State of Louisiana undermined the entire finding of jurisdiction. Furthermore, he objected to the majority's use of "official notice" in considering flow charts not made a part of the record in the case without giving the parties an opportunity to present analysis of those flow diagrams. Commissioner Carver concludes that the interstate gas which does flow into the Green System-East is so minimal and insignificant that the Commission should not take jurisdiction.

III.

At the outset, we note that the FPC has apparently decided to treat the entire Green System, formerly known as Green System-East and Green System-West, as a single unit for purposes of determining the existence of federal jurisdiction. In the past the Green System-East has been that part of United's New Orleans division facilities lying east of United's Napoleonville-Kosciusko interstate pipeline system. There is no abrupt stopping point for Green System gas when it reaches the Napoleonville-Kosciusko line; it simply continues to flow on toward the Baton

Rouge area, but with the pipe denominated the Green System-West. Apparently this artificial division has been allowed to exist unchallenged for a number of years. In the past this one continuous pipeline has apparently been treated, for certification purposes, as two separate entities. The Green System-West has long been certificated while the Green System-East has been considered totally intrastate. As Commissioner Carver points out in his dissent to Opinion 610:

> However, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit, free of Federal regulatory impact, and free to contract in any manner it chose, consistent with State law.

In Opinion 610, however, the FPC indicates that at this time the whole New Orleans facility, the entire Green System, must be considered as a unit.

The FPC, in finding jurisdiction, relies heavily on the fact that gas which must be denominated interstate gas flows into and out of the Green System. The flow charts used by the Commission for the year 1969 show that 5,419,519 Mcf of gas were supplied from interstate lines into the Green System-East, that part of the Green Sys-

tem east of the Napoleonville-Kosciusko line. Aside from a minuscule and irregular injection of less than 14,000 Mcf at Point "K", this entire volume of gas was injected at Points "I" and "J". The FPC found that this gate was interstate in nature because it was taken from a commingled stream of gas designated for the interstate market. Both Points "J" and "I" present similar factual situations since they both involve gas processing plants and the splitting of a commingled stream into two pipes, one leading to United's interstate system, the other into the Green System-East.

The Commission also held that substantial quantities of interstate gas were delivered into the Green System at Points "L" and "M", which are both located west of the Napoleonville-Kosciusko line in the Green System-West. At Point "L" over 38,000,000 Mcf is delivered into what is known as the Willow Glen Loop. This loop is also supplied with almost 7,000,000 Mcf directly from the Green System-West and it should be noted that this exit for Green System gas is located very close to the alleged breakpoint between the Green System-East and the Green System-West and that this injection of almost 7,000,000 Mcf is over three-fourths of the total volume which the so-called Green System-East delivers to the so-called Green System-West. At Point "M", the Napoleonville-Kosciusko line delivers approximately 2,000,000 Mcf into the so-called Green System-West. This 2,000,000 Mcf joins with the almost 2,000,000 left after delivery to the Willow Glen Loop and, with various further receipts and deliveries in the so-called Green System-West, continues on to the end of that pipeline for exchange into Mid-Louisiana's interstate pipeline for transportation and sale within the Baton Rouge area. It should be noted that the

Mid-Louisiana line contains interstate gas flowing in from Mississippi.

Based on these injections and comminglings of interstate gas into and within the Green System, the Commission found that it had jurisdiction over the entire system. In its opinion, the FPC noted that, even without consideration of Points "L" and "M", after adjustments, about 3.4% of the Green System-East's annual requirements were supplied from these interstate gas sources. For the peak day of January 6, 1970, the adjusted figures did show that 10.7% of the flow into the Green System-East facilities was injected from interstate gas. The Commission expressly found that these quantities are not *de minimis*. The Commission expressly found that without these injections of interstate gas there would have been a serious deficiency to serve the New Orleans area. Furthermore, the Commission found that this deficiency will seriously increase in the next few years, especially during the peak winter months, with the result that more and more interstate gas would have to be diverted to satisfy commitments. Thus, the Commission has explicitly held that the interstate injections are not minimal in amount nor are they of a temporary nature. Rather, the Commission feels that the amounts were significant, especially on peak days, and that continued delivery of interstate gas will be necessary to fill contractual obligations on the Green System-East.

Several, but not all, of the petitioners attack the Commission's use of a commingling theory based on *People of the State of California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC v. Amerada Petroleum Corporation*, 379 U.S. 687 (1965); and most especially, our decision

in *Louisiana Public Service Commission v. FPC*, 5 Cir. 1966, 359 F.2d 525 (commonly called Florida Parishes). In seeking to distinguish these cases the petitioners rely on this court's opinion in *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 5 Cir. 1972, 456 F.2d 326, in which we held that "the flow of gas from the Black System into the Green System in the case at bar is occasional and irregular as well as minimal". Id. at 339. The petitioners stress that our conclusion in that case was based on substantially the same evidence presented to the Commission and that we must now reach the same result.

As previously noted, the Supreme Court vacated that part of our opinion referred to above which held that there was no FPC jurisdiction over the Green System-East. 32 L.Ed.2d at 389. The Court held that the determination of jurisdiction was for the FPC in the first instance with our role limited to the normal processes of judicial review under the Natural Gas Act.

The Federal Power Commission was set up by Congress to bring a degree of regulatory expertise to the problems of regulating the transportation and consumption of natural gas, as well as other forms of energy. Because of their familiarity with the area in which they operate, the Commissioners are able to make substantially more accurate judgments than courts would be. Here the Commissioners have found that the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments. Because of our prior holding, it is almost certain we would not reach the same conclusion as an initial matter. However, ours is not to substitute our judgment for that

of the FPC on an issue where that body's intimate knowledge of the specific problems is concerned. We feel that determinations as to the amounts and constancy of the flow and their characterization in terms of impact and necessity therefor, once made by the Commission, cannot be lightly set aside by a court. In *Louisiana Power & Light* we were admonished by the Supreme Court to give the Commission the first chance to determine its jurisdiction in this case. The Commission has found that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. In making this latter determination, the Commission expressly considered and rejected the position of this court in *Louisiana Power & Light* as it applied to the facts found. Disagreeing with our holding that the injections were minimal, the FPC pointed out that the peak day injections were sufficient to heat over 100,000 homes. Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, Administrative Law Treatise §30.05.

Among other things, the Commission found that any amount of interstate gas would give jurisdiction. The opinion seems to suggest that one molecule would be sufficient to automatically confer federal control. We do not reach or consider that issue in this opinion. It appears to this court that there would clearly be times when the amounts of natural gas involved would be so irregular and minimal that Commission jurisdiction would be absurd. However, as noted, the Commission has found that such is not the case as to the Green System-East and we find that to reverse the Commission on this point would simply

be substituting our own judgment for that of the Commissioners, a luxury that we do not possess under our limited review.

Thus, we find we must sanction those parts of the FPC's Oponions 610 and 610-A which establish federal jurisdiction over the Green System as an interstate pipeline. We are somewhat troubled by the assertion of Commissioner Carver and several of the petitioners concerning United's motive in obtaining FPC jurisdiction. However, we do not feel that we have any available way to step in and sort out the competing inequities and reach what would be the fairest result for all concerned. That is the job for the Commission, and it is for the Commission to decide how to balance competing equities or how to penalize "unclean" parties in appropriate cases.

We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. Despite the innuendo and insinuation in this case, we see no direct evidence to support these suggestions of improper motive and conduct.

IV.*

The Hinshaw Amendment

Section 1(c) of the Act (the "Hinshaw Amendment") describes certain persons and facilities whose participation in the transportation and sale of gas in interstate commerce is "primarily of local concern and subject to regula-

*Judge Bell authored Part *IV. The Hinshaw Amendment*, for the court.

tion by the several States". 15 U.S.C. § 717(c). Under § 1(c) these persons and facilities are exempt from the jurisdiction of the Commission.[4]

In the proceedings before the Commission the petitioners maintained that even if the gas transmitted through the Green System-East were interstate in character, the Commission would not have jurisdiction over it because the Green System-East falls within the provisions of § 1(c). The Commission held that the Green System-East is not an exempt facility within the meaning of that section. The petitioners contend this holding was erroneous. We disagree.

Congress enacted the "Hinshaw Amendment" to preserve state control over local distributors who purchase gas from interstate pipelines.[5] Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems.

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[4]The text of the provision is the following:

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulations by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

[5]The amendment was necessary because of an early decision of the Supreme Court which, in construing the scope of the Commission's jurisdition over the transportation and sale of gas "in interstate commerce", held that interstate gas does not lose its interstate character in the hands of local distributors who buy gas for resale and ultimate consumption within the state. *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268. (1950).

We discern this intent in the legislative history. During the debate in both houses, supporters of the measure were at pains to emphasize that the proposed exemption was not for the benefit of interstate pipeline companies. See, e.g., 99 Cong. Rec. 10569-70 (remarks of Congressmen Hinshaw, Harris, and Yates). Critics of the measure suggested that the exemption would provide interstate pipelines with a means of defeating federal jurisdiction over portions of their operations which deliver gas for consumption wholly within a single state. One senator suggested that if an interstate pipeline placed one of its state-wide delivery systems under the control of a wholly owned subsidiary and delivered gas to the subsidiary at the state line, the local system would qualify for exemption under the terms of the bill. See 100 Cong. Rec. 3173 (remarks of Senator Burke). Senator Bricker, one of the sponsors of the bill in the Senate, vehemently denied this:

> "[T]here is no intent to place any pipeline company outside the jurisdiction of either the Interstate Commerce Commission or the Federal Power Commission.
>
> "As soon as such a pipeline company were formed, it would come within the jurisdiction of the Federal Power Commission.
>
> "This measure is not an effort — and I make this statement for the RECORD — to remove such companies from the jurisdiction of the Federal Power Commission. If such an interpretation is made, it is without basis or support or foundation upon anything stated at any of the committee hearings." *Id.*

The congressional intent not to exempt local segments of integrated interstate pipeline systems from regulation by the Commission finds clear expression in the language of the statute. Thus, under § 1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be consumed within a given state or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who receives gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same "person".

In the present case we are not called upon to define with precision the degree of independence that must exist between the person who gives and the person who receives gas at or within state lines in cases where the exemption is warranted. Nor need we consider the propriety of the Commission's prior determinations with regard to the availability or non-availability of the exemption in other cases. Under any plausible reading of the "other person" requirement, the Commission's determination in this case must be sustained.

By virtue of the flow of interstate gas from the Black System into the Green, the Green System-East has ceased to be an intrastate facility and has become, instead, a local branch of an integrated interstate pipeline. In all its

relevant parts, this pipeline system is operated by one person: United. At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points — the points at which the exemption must take effect, if at all — the "person-to-person" requirement simply is not met.

Petitioners contend, however, that the requisite exchange from one person to another need not occur at the points where the exemption must take effect. They say that the person-to-person requirement may be satisfied by exchanges occurring at other points in the network of distribution or supply. Specifically, they claim that in this case the requirement may be satisfied by various exchanges that occur between the Black System and certain independent procedures "upstream" of the points of connection between the Black System and the Green, or by various exchanges between the Green System and certain independent intrastate producers "downstream" of these points of connection.

The legislative history makes it clear, however, that in the contemplation of the supporters and the critics of § 1(c) the exchange between the two persons described in the statute took place at a point where an exemption was necessary to protect the receiver from federal jurisdiction that would otherwise exist under the *East Ohio* decision.[6] In other words, the point of the person-to-person exchange was a point where exemption was needed, and it was the point where the proposed exemption was to take effect. See the Senate and House debates, *supra*.

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[6]See Footnote 5.

Given this congressional understanding, we think that if the person-to-person requirement is to be met in this case, it must be met at a point of exchange where the exemption must take effect if the Green System-East is to be exempt. The point of exchange must correspond in some measure at least to the points of exemption. Here, however, the points where exemption must take effect are the points of connection between the Black System and the Green — the points where contributions of interstate gas to the Green System would otherwise confer federal jurisdiction. At none of these points is gas exchanged from one person to another.

The logic of a technical requirement that identifies the point of exemption with the point of the requisite exchange is apparent on the facts of this case. The contributions by independent producers of interstate gas downstream of the points of connection between the Black System and the Green, or the contributions of interstate gas upstream of these points, do nothing to change the fact that the Green System is now a local branch of an integrated interstate system. Given Congress' overriding intent not to bifurcate the regulation of such system, these contributions should not enhance the Green System's eligibility for exemption under § 1(c). Under our interpretation of the person-to-person requirement, they do not.[7]

The Purple System

The "Purple System" is a pipeline system in United's Lafayette district in southwestern Louisiana. This pipeline system, like the Green System-East, has long been considered an intrastate pipeline not subject to Commis-

[7]Because we decide the Hinshaw issue on this ground, we need not consider the other grounds asserted by the Commission as a basis for its refusal to recognize the allegedly exempt status of the Green System-East.

sion jurisdiction. Two parties, Cities Service Oil Company and Gulf States Utilities Company, challenge the FPC's holding of federal jurisdiction over the Purple System.

The FPC, without dissent as to these facilities, made specific findings showing that the Purple System is unquestionably an integrated part of United's interstate system. At Point "A", United obtained gas for the Lafayette facilities by exchange with an interstate transmission line of Texas Eastern Transmission Corporation. At Point "B" on the system map, United obtained over 1,000,000 Mcf on an annual basis from an interstate line of Texas Gas Transmission Corporation. At Point "C" on the flow chart, United delivered, on an annual basis, over 24,000,000 Mcf to Penzoil Pipeline Company for transportation across the Louisiana line into Texas. At Point "D", United received over 1,000,000 Mcf from Tennessee Gas Pipeline Company's interstate pipeline. At Point "H", over 16,000,000 Mcf were supplied into two streams, with a little over one-half being delivered into one of United's interstate pipelines for transportation out of the state, and the remainder used in the intrastate system. Finally, at Point "O", Tennessee delivered over 22,000,000 Mcf on an annual basis to United's Purple facilities which were commingled with locally produced gas and use in the Lake Charles area.

These facts amply establish that the Purple System is an integrated pipeline facility with many connections and exchanges of gas with interstate facilities. Gas clearly flows out of this system for interstate markets at Point "C". Significant volumes of gas from interstate facilities are introduced into the Purple System for local sale.

Cities Service attempts to distinguish the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases by stating that all the facilities used for transportation for delivery to Cities Service at its refinery are located in Louisiana and all of the gas used at the Cities Service plant originates at production points or exchange points within Louisiana. Cities Service alleges that this makes the pipeline system purely intrastate.

On the contrary, we feel the evidence clearly establishes that this Purple System is part of an integrated pipeline network involving significant transportation of interstate volumes. We feel that the *Amerada*, *Lo-Vaca* and *Florida Parishes* cases cannot be distinguished successfully. We will not "lop off" certain parts of the otherwise integrated system to create an artificial intrastate pipeline.

For the reasons set forth above, the result reached by the FPC in Opinions 610 and 610-A with regard to jurisdiction over the Green System and Purple System is

AFFIRMED.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1972

Nos. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

FPC No. CP71-89
LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC. and
CITIES SERVICE OIL COMPANY, ET AL,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

On Petitions to Review and Set Aside Opinions and
Orders of the Federal Power Commission

Before BROWN Chief Judge, BELL and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Louisiana Power & Light Company and Texaco, Inc., and Cities Service Oil Company, Et Al for review of orders of the Federal Power Commission of the United States, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the Federal Power Commission are hereby affirmed:

It is further ordered that petitioners pay to respondent-intervenor, United Gas Pipe Line Company the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1973

Issued as Mandate:

Denial of Rehearing of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 72-1714, 72-1715,
72-1720, 72-1721,
72-1724, 72-1784,
72-2185, and 72-2188

LOUISIANA POWER & LIGHT COMPANY, and
TEXACO, INC., and
CITIES SERVICE OIL COMPANY
ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

On Petitions to Review and Set Aside Opinions and Orders of the Federal Power Commission

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ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion June 28, 1973, 5 Cir., 1973, ____ F.2d ____).

(September 5, 1973)

Before BROWN, Chief Judge, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

Opinions of the Federal Power Commission

DC-51

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr.,
Albert B. Brooke, Jr.,
Pinkney Walker, and
Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610

OPINION AND ORDER FINDING JURISDICTION AND REMANDING PROCEEDING FOR RECEIPT OF ADDITIONAL EVIDENCE

(Issued February 9, 1972)

NASSIKAS, Chairman:

1. United Gas Pipe Line Company (United) filed on October 1, 1970, an application pursuant to Section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing certain operations, sales and services. Specifically, United seeks to have added to its existing certificated system two large service areas in Louisiana and a few sales for resale and services in Texas. United avers that it now seeks to obtain a certificate authorizing the aforementioned operations, sales, and services because of the Commission's holding in the *Florida Parishes* case[1] to the effect that the commingling in transmission facilities of gas moving in interstate commerce with local or intrastate gas makes the operation of the facilities, as well as the sales and services rendered by means of such facilities, subject to the Commission's jurisdiction.

2. A hearing was held in this proceeding from June 7,

[1] *United Gas Pipe Line Co.*, 30 FPC 569 (1963), *aff'd sub nom. Louisiana Public Service Commission v. F. P. C.*, 359 F.2d 525 (5th Cir. 1966), *cert. denied*, 385 U.S. 833 (1966).

1971, through June 18, 1971.[2] At the conclusion of the hearing United moved for omission of the intermediate decision procedure and that motion was granted by the Commission's order issued July 2, 1971. Thereafter, 17 parties filed initial briefs and 16 submitted reply briefs.[3] Since this order is in the nature of an interim decision pending the receipt of additional evidence upon remand, which we order herein, the arguments of the parties will not be referred to herein except in a few minor respects. The oral arguments requested by some parties are denied because the deficient record would make the holding of oral argument nonproductive at this stage of the proceeding.

JURISDICTIONAL ISSUE

3. The first issue to be resolved is whether the Commission has jurisdiction over the operation of the facilities involved and over the sales and other services being rendered by means of such facilities. That question must be determined on the basis of the gas flow in the areas concerned as shown by the evidence.

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[2]The following parties have intervened in the proceeding: Algonquin Gas Transmission Company; Boise Southern Company; The Parish of Cameron, Louisiana; Town of Carencro, Louisiana; Cities Service Oil Company; Consolidated Gas Supply Corporation; Gulf States Utilities Company; Humble Oil & Refining Company; Laclede Gas Company; State of Louisiana; Louisiana Gas Service Company; The Louisiana Municipal Association; Louisiana Power & Light Company; The Louisiana Public Service Commission; Mid-Louisiana Gas Company; The Public Service Commission of the State of Missouri; Mobile Gas Service Corporation, Mississippi Valley Gas Company, and Clarke-Mobile Counties Gas District; Monsanto Company; National Gypsum Company, Scott Paper Company and Stauffer Chemical Company; The City of New Orleans, Louisiana; New Orleans Public Service Inc.; The Public Service Commission of the State of New York; The Ohio Fuel Gas Company and The Manufacturers Light and Heat Company; Shell Oil Company; Southern Natural Gas Company; Texaco Inc.; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Towns of Walker and Livingston, Louisiana; and United Gas, Inc.

[3]On November 2, 1971, the State of Louisiana, Louisiana Municipal Association and Parish of Cameron, Louisiana, filed a motion for permission to file a late reply brief submitted therewith. We have accepted the brief for filing and have considered the arguments made therein.

(1) *Description of Texas Facilities, Sales, and Services*

4. United's evidence shows that it has already received a certificate from the Commission authorizing the construction and operation of all the transmission facilities which it owns and operates in its Victoria Division of Texas. The Victoria Division extends along the Texas Gulf Coast from a point near Agua Dulce to a point northwest of Houston. United's testimony shows that it has never obtained a certificate authorizing the sale of gas from the Victoria Division to distributors which resell the gas in 14 communities, nor has United ever obtained a certificate authorizing it to deliver gas to the 7 direct industrial customers which it serves from its facilities in the Victoria Division.

5. United's flow diagram show that United has a single integrated pipeline system in the Victoria Division. Gas is delivered into the system from numerous gas fields and travels out of the State of Texas in interstate commerce except for deliveries made from the interstate facilities to the 14 communities and 7 direct-sale customers which United seeks authorization to serve.

(2) *Determination of Jurisdiction Regarding Victoria Division*

6. There appears to be no doubt but that the Commission has jurisdiction over the 14 sales for resale and the transportation and delivery of gas to the seven direct-sale customers of the Victoria Division. In *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965), the Supreme Court affirmed the Commission's assertion of jurisdiction over the sale and transportation of gas in *Montana-Dakota Utilities Co.*, 30 FPC 200 (1963). In the *Amerada* case the interstate pipeline company purchased gas at the tail-

gates of three gasoline plants within the State of North Dakota and commingled in the same pipeline gas which was contractually destined for use only within the State with gas purchased from the three plants for use outside of the State. The Commission held that the commingling of the so-called intrastate gas with the gas moving out of the State converted all the sales from the gasoline plants into sales for resale in interstate commerce subject to the jurisdiction of the Commission. In the *Florida Parishes* case *supra* the Commission stated that "* * * The removal of a portion of the gas thus flowing in interstate commerce does not change the gas removed from the stream into intrastate gas" (30 FPC at 563).

7. Since the evidence in this proceeding shows that United purchases gas from many sources for transportation and resale in interstate commerce and commingles the gas traveling to markets outside the State with gas delivered to customers within the State, all sales for resale and deliveries to direct-sale customers within the State are subject to the Commission's jurisdiction under the rationale expressed by the Commission in the *Florida Parishes* and *Amerada* cases.

8. However, the Commission at this time does not believe it would be in the public interest to grant a certificate with respect to the Victoria Division because United's evidence is unclear in some respects. Specifically, United did not make it clear in its exhibits whether it is now rendering some service pursuant to Commission authorization and wishes to have additional sales for resale and services certificated, or whether it is now rendering no service in the Victoria Division pursuant to Commssion orders and now wishes to obtain a certificate covering all sales for resale and services being performed in the Victoria

Division. United's evidence should also clarify whether sales to pipeline companies shown on the flow diagrams have been certificated, whether any of the other deliveries shown on the flow diagrams have heretofore been certificated, and whether the flow diagrams reflect all services and sales being rendered, or only those for which a certificate is requested. United's evidence in the remanded proceeding should show whether the Victoria sales and services have heretofore been included as requirements to be met when presenting gas reserve and deliverability data to the Commission in certificate cases or in the preparation of its Form 15. Additionally, United should present evidence with respect to alternate sources of gas supply for the Victoria customers.

(3) *Description of Louisiana Facilities, Sales, and Services*

9. The certificate which United seeks for Louisiana facilities, sales, and services would not only cover authorization to make sales for resale and deliveries of gas to direct-sale customers, but would also grant authority to operate the facilities by means of which such sales and services are rendered.

10. The facilities involved are situated in that portion of United's service area known as the New Orleans Division which is located entirely in Southern Louisiana south of Marksville, Louisiana. The New Orleans Division is further subdivided into two districts called the Lafayette District and the New Orleans District. The Lafayette District lies in the western part of Southern Louisiana west of Baton Rouge and Napoleonville, while the New Orleans District is situated in the eastern part of Southern Louisiana and includes Baton Rouge and Napoleonville.

11. Since United operates an existing interstate pipeline system in Southern Louisiana under certificates issued by the Commission as well as the facilities comprising the Lafayette and New Orleans Districts, United's evidence includes maps which use three colors to differentiate the various facilities and service areas. The certificated transmission lines are shown in black, the Lafayette District facilities are depicted in purple, and the New Orleans facilities are outlined in green. Throughout this opinion the purple facilities will be referred to as the Lafayette facilities and the green facilities will be referred to as the New Orleans facilities. United's application requests that the Commission certificate the Lafayette and New Orleans facilities and all sales and services rendered by means of such facilities.

12. Although United's Exhibit 1 shows letter designations from "A" through "W" to indicate that there are 24 points where interstate gas enters the Lafayette and New Orleans facilities, none of those interconnections has ever been certificated by the Commission. Thus, the facts which must be used for determining jurisdiction are based on unauthorized flows of interstate gas into and out of the Lafayette and New Orleans facilities. Diagrams showing the flow of gas on an annual basis (for the 12 months ending December 31, 1969) were presented by United in support of its belief that the Lafayette and New Orleans facilities are now integrated with its interstate system. The Commission has examined both the annual flow diagrams and the flow diagrams for the peak day of January 6, 1970, which were received in evidence as Item E (Tr. 558). In addition, the Commission has taken official notice of United's flow diagrams for the peak day of March 3, 1971, which were filed July 7, 1971, pursuant to Section 260.8

of the Commission's Regulations under the Natural Gas Act.

13. While United's Exhibit 1 shows 24 points indicating where interstate and uncertificated gas supplies may be commingled, scrutiny of the 12 points which were discussed in the cross-examination of United's witnesses is sufficient to establish that the operation of United's Lafayette and New Orleans facilities are presently subject to the Commission's jurisdiction.

(a) *Flow of Interstate Gas in Lafayette Facilities*

14. At point "A" on Exhibit 1 there is an interconnection between an interstate transmission line of Texas Eastern Transmission Corporation and a Lafayette pipeline lying north of the City of DeQuincy. Since this interconnection is a point at which United exchanges gas with Texas Eastern, the flow diagram shows no annual volumes to be entering United's system, but on the peak day of March 3, 1971, Texas Eastern delivered 105,173 Mcf of which approximately half traveled southeasterly toward the Lake Charles area and the remaining volume was transported northwesterly into the Leesville area.

15. Point "B" on Exhibit 1 is located at an interconnection between Texas Gas Transmission Corporation's interstate line and a Lafayette pipeline near Iowa, Louisiana. On an annual basis Texas Gas delivered 1,371,681 Mcf to United at that point and on the peak day of March 3, 1971, United received 17,636 Mcf from Texas Gas at that point. The gas was commingled with intrastate gas and sold to customers in the Lake Charles area.

16. Point "C" is located on the western boundary of the State of Louisiana southeast of Beaumont, Texas. At that place a Lafayette pipeline interconnects with Pennzoil

Pipeline Company's facilities which transport gas into Texas. On an annual basis 24,254,556 Mcf are delivered to Pennzoil and on the peak days of March 3, 1971, and January 6, 1970, volumes of 1,075 Mcf and 58,399 Mcf, respectively, were delivered to Pennzoil for transportation out of the State of Louisiana.

17. At point "D" United receives gas in the East Cameron Area from Tennessee Gas Pipeline Company's interstate pipeline and such gas is transported along with locally-produced gas to consumers in the Lake Charles area. On an annual basis Tennessee delivered 1,357,396 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 24,079 Mcf and 41,323 Mcf, respectively.

18. At point "H" gas produced in the Lawson field area is delivered into a pipeline extending from Lafayette to Bancroft. Although all of the gas received at this point is produced in Louisiana, the gas is split at the point of delivery so that out of 16,594,766 Mcf received on an annual basis, 9,717,494 Mcf are transported easterly for delivery into one of United's interstate pipelines transporting gas out of the State, while the remainder is transmitted to a market in the Leesville area. On the peak day of March 3, 1971, 38,138 Mcf entered the line and all of it was transported out of the State. Of the 38,429 Mcf delivered from the Lawson field on the peak day of January 6, 1970, 21,395 Mcf were transported out of the State while the remainder was consumed in local markets.

19. At point "O" Tennessee delivers gas to United from its interstate line near Iowa, Louisiana. On an annual basis Tennessee delivered 22,138,127 Mcf and on the peak days of March 3, 1971, and January 6, 1970, Tennessee delivered 47,919 Mcf and 117,173 Mcf, respectively. The

gas is transported by United with locally-produced gas and consumed by customers in the Lake Charles area.

(b) *Flow of Interstate Gas in New Orleans Facilities*

20. At point "I" United receives gas from producers in the Bastian Bay area whose sales have been certificated for interstate commerce. The gas enters one of United's major certificated interstate gas pipelines extending toward Lirette, Louisiana, and also enters one of United's 20-inch supply lines which transports gas to New Orleans. On an annual basis the 20-inch line received 3,286,407 Mcf from the Bastian Bay area and on the peak days of March 3, 1971, and January 6, 1970, received 72,990 Mcf and 56,182 Mcf, respectively.

21. At point "J" United receives gas from producers in the Bay Marchand, Calliou Island, and Bayou Jean la Croix fields. On an annual basis United received 20,414,367 Mcf from those fields of which 2,119,631 Mcf were transported in United's pipeline extending to the New Orleans area while the remainder of the gas was transported to market in United's certificated Lirette-Mobile interstate pipeline. On the peak day of January 6, 1970, 66,432 Mcf were received of which 16,437 Mcf entered the New Orleans pipeline and the remainder flowed into the Lirette-Mobile line. On the peak day of March 3, 1971, 47,116 Mcf were received and all of the gas on that day entered the Lirette-Mobile pipeline.

22. At point "K" United receives gas from producers in the Houma and other fields. The stream is split with some gas entering a 12-inch line extending toward New Orleans while the bulk of the gas travels in United's certificated Lirette-Mobile interstate pipeline. On an annual basis 13,481 Mcf entered the New Orleans pipeline and on the

peak days of March 3, 1971, and January 6, 1970, no gas entered the New Orleans facilities.

23. At point "L" United's certificated Kosciusko interstate pipeline delivers large volumes of gas into local facilities for transportation to Gulf States Utilities Company's Willow Glen electric generating station which is located south of Baton Rouge. On an annual basis 38,177,591 Mcf were delivered at that point and on the peak days of March 3, 1971, and January 6, 1970, United delivered 64,017 Mcf and 15,744 Mcf, respectively, for consumption in the power plant.

24. Point "M" is located very close to point "L", but the gas flows from the certificated interstate line into an uncertificated pipeline extending toward the Baton Rouge area. On an annual basis 2,055,759 Mcf were delivered and on the peak days of March 3, 1971, and January 6, 1970, 52,762 Mcf and 64,868 Mcf, respectively, were delivered.

25. At point "X" United receives gas produced in the De Large field area. After receipt, the gas stream is split with gas entering both the interstate and local markets. On an annual basis 2,773,124 Mcf were received of which 157,426 Mcf were consumed in the Dulac area. On the peak days of March 3, 1971, and January 6, 1970, 5,490 Mcf and 9,061 Mcf were received with 77 Mcf and 145 Mcf, respectively, being consumed in local markets while the remainder entered interstate pipelines.

(c) *The Unauthorized Gas Flows Establish Jurisdiction*

26. The foregoing description of the flow of interstate gas in United's Lafayette and New Orleans facilities shows beyond any doubt that United's introduction of substantial quantities of gas into those uncertificated facilities from its interstate gas sources is a suffcient commingling of

interstate and uncertificated gas supplies to bring the operation of the Lafayette and New Orleans facilities, together with the sales and services made from those facilities, within the Commission's jurisdiction under the Natural Gas Act.

27. As indicated in the foregoing discussion of delivery points, on the peak days of 1971 and 1970, interstate volumes of 189,846 Mcf and 153,376 Mcf, respectively, flowed into the New Orleans District facilities. Those volumes would be adequate to heat well over 100,000 single-family residences on a cold day.

28. A *de minimis* argument is advanced by certain parties with respect to commingled gas in that portion of the New Orleans District, referred to as the Green System-East, located east of the Napoleonville-Kosciusko line. New Orleans Public Service Inc. (NOPSI) offered Exhibit 22 showing that deliveries of interstate gas by United into Green System-East represented 7.79 percent of peak-day requirements and 2.39 percent of annual requirements for the 12 months ended July 31, 1970.

29. A comparison of the adjusted flow diagrams upon which Exhibit 22 is based[4] with United's actual flow data on file with Commission, referred to previously, shows that the actual peak-day deliveries from gas supply sources differ from the adjusted flows in almost every instance.

30. At Bastian Bay (point "I") where interstate gas entered the Green System-East the actual volumes shown for the peak day, January 6, 1970, exceeded the adjusted flow by 19,489 Mcf. This increases the percentage of peak-

[4]Exhibit 22 indicates that the source for the data shown therein was United's response to FPC Staff Request No. 38 in Docket No. RP71-41, prepared for United's rate proceeding in that docket, which consisted of flow diagrams captioned "adjusted".

day injections of interstate gas into the Green System-East from 7.79 percent to 10.7 percent. A review of the same data with respect to the annual volumes of interstate gas flowing into the Green System-East indicates that the 2.39 percent should be increased to about 3.4 percent. We find that these quantities are not *de minimis*.

31. Furthermore, United projects the peak-day demand in the New Orleans-Baton Rouge area to be at a level of 1,002,000 Mcf during the 1971-72 winter period with a projected intrastate supply of only 413,000 Mcf (Tr. 91-92). Accordingly, United shows that there is a peak-day deficiency in gas supply 598,000 Mcf which is contends must be supplied by interstate sources. On the basis of this evidence, there would be a substantial gas supply deficiency in the City of New Orleans area, within the Green System-East, of approximately 448,000 Mcf per day during the 1971-72 winter heating season which would be met with volumes from interstate sources transported through certificated interstate facilities. Moreover, United contends that this deficiency[5] will increase for the peak day of the 1972-73 winter heating season and that it will be necessary for United to increase its deliveries into the Green System-East if that system is to remain on a parity with all other systems.[6]

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[5]A question has been raised as to whether a producer affiliate of United has gas available, which can be delivered into either interstate or uncertificated facilities, in sufficient quantities to meet the New Orleans District's deficiencies and thereby obviate the need for United to obtain gas from its interstate sources. Even assuming that the Commission sanctions such an arrangement we find no evidence to support that proposition; to the contrary the evidence in the record indicates that on peak days gas from interstate sources in volumes of about 600,000 Mcf will have to be introduced into the New Orleans District. To test the possibility of obtaining gas in those quantities from Lirette sources, we have examined both the Form 15 and System Flow Diagram reports filed pursuant to our regulations. The data from those sources show that the peak-day flows from Lirette to *any* destination would fall short of meeting the requirements by several hundred thousand Mcf.

[6]See also Exhibits 3 and 34.

32. Mr. Echterhoff testified at Tr. 91-92 that the peak-day deficiency of intrastate reserves for meeting the needs of the New Orleans District would be 684,000 Mcf in 1972-73, *i.e.*, the requirements were 1,018,000 Mcf and the "intrastate" reserves were 334,000 Mcf. Thus, 67.2 percent of the peak-day requirements would have to come from *interstate* sources.

33. If the Green System-East (or New Orleans area by itself) is isolated from the Willow Glen-Baton Rouge area, the needs for the New Orleans area by itself amount to 542,000 Mcf. The deficiency would be made up by obtaining interstate gas from the Bastian Bay-Lirette-Mobile system.

34. Testimony in the record of the case reveals that the peak-day deficiency on the Green System would result in approximately 70 percent curtailment of the Green System, including the New Orleans distributor — the company upon which human needs customers depend. To test this testimony, we have taken notice of the filings required by our regulations.

35. The peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations as well as the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities. We examined the peak-day flow diagrams for several reasons. First, it is important in this proceeding to understand the impact on United's existing interstate customers resulting from deliveries of gas to the New Orleans and Lafayette Districts on peak days because those volumes are illustrative of the extent of curtailments to United's existing customers which will be necessary in

order for the uncertificated markets to be served on cold days. Second, Section 157.14(a)(8) requires the submission of peak-day flow diagrams as a part of all certificate applications in order to show the applicant's ability to serve its proposed customers on the day of maximum demand. Third, the Commission normally examines peak-day flows in determining jurisdiction. See, *e.g.*, *Florida Parishes*, *supra*, 30 FPC at 564, and *Amerada*, *supra*, 30 FPC at 203. Fourth, some of the parties had relied on Exhibit 22 showing peak-day flows based on flow diagrams which were introduced in United's rate proceeding in Docket No. RP71-41, and it was appropriate that the Commission examine peak-day flow diagrams which reveal actual flows of gas on the peak day rather than the adjusted flows which were utilized in the flow diagrams submitted in the rate proceeding.

36. We have examined all available data in finding that the uncertificated facilities, as well as the sales for resale and transportation services rendered thereby, are subject to the Commission's jurisdiction. In addition, the annual flow diagrams which were a part of the record reveal that gas flows out of the Green System-East.

37. The testimony (Tr. 326) indicates that point "M" is at the extreme west end of the Green System-East. At that point 8,256,920 Mcf left the Green System-East and entered the Green System-West and of that volume 6,879,259 Mcf were transported toward Willow Glen while the remaining 1,377,661 Mcf were transported toward Baton Rouge and commingled with 2,055,759 Mcf of interstate gas delivered into the Green System-West from the Napoleonville-Kosciusko interstate pipeline. The commingled stream of Green System-East and interstate gas there-

after was used to serve markets in Louisiana and ultimately provided 2,054,190 Mcf at point "U" for delivery to Mid Louisiana Gas Company's interstate pipeline which extends out of the State of Louisiana.

38. The importance of examining both annual and peak-day flow diagrams becomes obvious from the foregoing illustration because the peak-day flow diagram for March 3, 1971, shows that 22,811 Mcf were transported out of the Green System-East into the Green System-West but were thereafter commingled with interstate gas and wholly used in the Willow Glen area. Although 38,557 Mcf were delivered to Mid Louisiana on that day at point "U", none of the Green System-East gas is shown to be flowing beyond the Willow Glen pipeline. Of course, gas does flow out of the Green System-East on both a peak-day and an annual basis, but the Green System-East gas does not appear to flow out of the State of Louisiana except on an annual basis.

39. We have considered the volumes delivered at all points in our discussion with respect to the flow of gas in the Lafayette and New Orleans Districts. Our finding of jurisdiction was based on the flow of interstate gas in and out of the jurisdictional uncertificated facilities. It is unnecessary for us to separate interconnection points in the Green System-East from those related to the Green System-West because the New Orleans District is situated in the eastern part of Southern Louisiana and *includes* Baton Rouge and Napoleonville.

40. As previously stated, we have considered the actual peak-day volumes as set forth in United's flow diagrams filed pursuant to Section 260.8 of our Regulations and the adjusted volumes which were shown on the flow diagrams

presented in United's rate case in Docket No. RP71-41 that were used by the witness sponsoring Exhibit No. 22 from which the 2.39 percent commingling figure is obtained.

41. In addition to the adjusted volumes used in United's rate proceeding in Docket No. RP71-41, it should be noted that if we had referred to the flow diagrams submitted by United in its most recent rate proceeding in Docket No. RP72-75, we would have been provided with data showing that much larger volumes of gas are to be transported on both a peak-day and annual basis into the Green System-East. To be specific, instead of a zero volume entering the Green System-East at point "J" on the peak-day of March 3, 1971, the adjusted figure would be 86,766 Mcf, and instead of 72,990 Mcf entering the Green System-East at point "I" on the peak-day of March 3, 1971, the adjusted figure would be 108,371 Mcf. Similarly, instead of an annual volume of 2,119,631 Mcf entering the Green System-East at point "J", the adjusted figure would be 1,371,196 Mcf, and instead of an annual volume of 3,286,-407 Mcf entering the Green System-East at point "I", the adjusted figure would be 11,024,446 Mcf. Since the adjusted figures used in Docket No. RP72-75 are attempting to estimate volumes for the 1971-72 heating season, they indicate that the Green System-East is expected by United to become increasingly reliant upon deliveries from United's interstate facilities in order to meet the uncertificated market's gas requirements.

42. In determining the jurisdictional issue, however, we do not believe that the relative level of the volumes involved are controlling. Section 1(b) of the Act does not delimit the amount of gas to be transported or sold in

interstate commerce necessary for the exercise of Commission jurisdiction.

43. The case of *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 535-36 (1945), arising under the Federal Power Act, is instructive in this regard. There the Supreme Court, addressing itself to a *de minimis* argument, stated:

> Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state * * *
>
> Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.

44. Our decision herein is in accord with *Federal Power Commission* v. *Florida Power & Light Co.* (U.S. Supreme Court No. 70-38, decided January 12, 1972, ____ U.S. (____ 40 LW 4141) wherein the Supreme Court held that an electric utility was subject to the jurisdiction of this

Commission because energy transmitted by it was commingled with energy transmitted by a jurisdictional company. There the issue was whether any energy was transmitted in interstate commerce *at all*. As the Court stated the test is not how much, but whether; "* * * no matter how small the quantity, FPC jurisdiction will attach because it is settled that Congress has not 'conditioned the jurisdiction of the commission upon any particular volume or proportion of interstate energy involved and we do not . . . supply such a jurisdictional limitation by construction' " (Slip Op., p. 9, n. 10). The dissent noted that the commingling is minuscule and incidental.

45. The Louisiana Public Service Commission and several other parties contend that the Green System-East should be exempted from Commission jurisdiction under Section 1(c) of the Act.[7] The argument is made that to the extent some volumes of interstate gas have been delivered into the Green System-East such gas has been received, transported, and consumed wholly within the State of Louisiana, and that since the rates, services and facilities of the Green System-East are regulated by the Lou-

[7]Section 1(c) of the Act reads as follows:

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State comission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and services of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

isiana Public Service Commission, the requirements for exemption under Section 1(c) have been met. United maintains that Section 1(c) is inapplicable since the Louisiana Public Service Commission may not regulate direct sales,[5] and that granting an exemption under Section 1(c) would leave a regulatory gap.

46. Staff opposes an exemption on additional grounds. It dismisses initially the assertion that Section 1(c) is self-executing and that no application therefor nor showing in support thereof need be made, citing the provision in the Section requiring an evidentiary showing with respect to State commission jurisdiction. Section 1(c) is applicable, argues Staff, only "* * * if all the natural gas so received is ultimately consumed within such State", and that is not the case with all the gas received by United from other persons in Louisiana, *e.g.*, deliveries from the Getty plant at Bastian Bay. It also contends that the "from another person" requirement of the Section is overlooked by those seeking an exemption.

47. The proponents of the Section 1(c) exemption agree that United's Green System-East receives gas from United's system, but seek succor by citing the case of *Mountain Gas Company*, Docket No. CP68-303, and *Cabot Corporation*, Docket No. CP68-176, 42 FPC 305, *aff'd sub nom. Public Service Commission of West Virginia* v *F. P.C.*, 437 F.2d 1234 (4th Cir. 1971) for the proposition that the gas need not be received "from another person"

[5]Art. 6, Sec. 4 of the Louisiana Constitution as amended in 1964, provides in pertinent part that: "* * * the [Public Service] Commission shall have no power or authority to supervise, govern, regulate and control any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process, whether such direct sales are made by natural gas producers, natural gas pipeline companies, natural gas distribution companies, or any other person engaging in such sale of natural gas."

as plainly set out in Section 1(c). In our view *Mountain Gas* is inapposite since most of the gas there in question was purchased from another person.[9] Noting that Section 1(c) is applicable solely "to any person engaged in or legally authorized to engage in the transportation of gas in interstate commerce," Staff additionally asserts that the arguments of the parties favoring exemption are inconsistent with their contention that the Green System is an entirely separate intrastate entity. This apparent inconsistency has no bearing on our determination of this question, as we reject the tortured reasoning which would artifically maintain a division of the integrated facilities of United's system. We find that a Section 1(c) exemption does not obtain in the circumstances presented.

48. The Louisiana Commission does not regulate any aspect of direct sales and thus, in any event, an exemption would not be available, even to a separate pipeline company.[10] This Commission, on the other hand, has substantial regulatory authority over the service of gas to direct customers. Deliveries to direct customers cannot be made without a certificate from this Commission and the Commission must determine whether the public convenience and necessity is met in light of the proposed terms of those transactions.[11] In addition, the Commission, pursuant to

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[9]In that case part of the gas was received by Cabot from its own wells at some of the facilities proposed to be exempted. The bulk of the gas, however, was purshased from Tennessee Gas Pipeline Company.

[10]We take official notice of a letter to this Commission, dated June 16, 1971, in which the Chairman of the Louisiana Public Service Commission indicates that the Louisiana Commisson does not exercise jurisdiction over direct sales to industrial customers. We note that 1(c) exemptions have been previously granted within Louisiana. See *Central Louisiana Electric Co., Inc.*, Docket No. CP62-129, 27 FPC 374 (1962); *United Gas Pipe Line Co.*, Docket No. CP68-203, and *Sugar Bowl Gas Corp.*, Docket No. CP68-204, 39 FPC 619 (1968). However, we note that in each case that there was no disclaimer of jurisdiction by the Louisiana Public Service Commission, as in this case.

[11]*Panhandle Eastern Pipe Line Co. v. F. P. C.*, 232 F.2d 467, 471 (5th Cir. 1956).

Section 7(b), must determine whether service to a direct customer or any other customer should be abandoned because of depleted gas supply or because it no longer meets the public convenience or necessity. The price at which the direct industrial sale is made is thus material in both certificate and abandonment proceedings. While the absence of State regulation is not material to a determination of our own jurisdiction; it nevertheless follows that the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State and therefore contribute measurably to the regulatory process.

49. We recognize, however, that the State purports to regulate sales for resale in the New Orleans and Lafayette Districts. While our assertion of jurisdiction herein would substitute Federal regulation for State regulation over such sales, the substitution of Federal regulation occurs simply as a consequence of our determination that these sales are in interstate commerce and the fact that State regulation will be affected has no bearing on our determination. Moreover, the exercise of our jurisdiction over sales and services in interstate commerce does not impinge upon State regulation of sales and services by the distributors receiving gas from United.

50. In declining to grant United and exemption under Section 1(c) of the Act, we are aware that such an exemption was granted in *United Gas Pipe Line Co.*, Docket No. CP66-137, 35 FPC 172. However, that case involved a sale for resale over which the Louisiana Public Service Commission asserted jurisdiction; moreover, the gas was purchased from Transcontinental Gas Pipe Line Corpora-

tion, "another person" within the meaning of Section 1(c), and the facilities involved were not connected with United's interstate system. The present case is clearly distinguishable inasmuch as it involves direct sales, over which the Louisiana Public Service Commission has disclaimed jurisdiction, the gas is not purchased from "another person", and the facilities involved are directly connected to United's interstate system.

51. It is argued that United deliberately introduced interstate gas into the New Orleans District to bring about the situation that exists in order to serve its own interests with respect to its direct-sale contracts and curtailment plans. The alternative that this argument suggests is that the Commission should order United to desist from making any further deliveries into the New Orleans District. With the exception of two producers, no party to this proceeding suggests this course of action. It appears from the record that were it not for deliveries of interstate gas in the past years, the system would have been unable to meet its peak-day requirements.[12] Moreover, as we have noted herein, the Green System-East will have a considerable deficiency in its peak-day gas requirements for the current winter heating season, as well as for the next heating season. Thus, the jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination.[13]

52. We believe that no extended discussion of the applicable law is required in support of our jurisdiction under the circumstances presented. The Commission's opinion in *Lo-Vaca Gathering Co.*, 26 FPC 606 (1961),

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12See Exhibit 22.

13See *Western Union Telegraph Co. v. Speight*, 254 U.S. 17 (1920); *Price v. Western Union Telegraph Co.*, 156 Fla. 406, 23 So.2d 491 (1945).

aff'd sub nom. California v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), followed by the Supreme Court's *Amerada* and the Fifth Circuit's *Florida Parishes* opinions *supra*, leaves no room for argument that the commingling of interstate gas with intrastate gas and the delivering of gas to intrastate markets from interstate pipelines are sufficient integration of interstate and intrastate operations to bring the uncertificated sales and facilities within the Commission's jurisdiction. As the court pointed out in the *Florida Parishes case* (359 F.2d 525 at 528):

> * * * The facts in each of those cases [*Lo-Vaca* and *Amerada*] more strongly supported the argument for state jurisdiction over the gas produced, gathered, transported and sold in the same state than do the facts of this proceeding. In each instance, however, the Supreme Court held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction".

53. We wish to make clear that the facilities, sales, and services in question became subject to our jurisdiction at such time as the commingling of interstate and intrastate gas took place. The Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural-gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert denied*, 352 U.S. 971 (1956). *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349 (2nd Cir. 1971), *cert. denied*, ____ U.S. ____ (Sup. Ct. No. 70-216, October 12, 1971).

54. Although there is sufficient evidence in the record

to find jurisdiction, we believe that certain aspects of United's operation of its facilities in the area in question require amplification. In the remanded proceedng United should present an Exhibit K setting forth the lengths and diameters of pipelines and other facilities in the Lafayette and New Orleans Districts for which it seeks certification. The original cost of all facilities should be shown together with accrued depreciation thereon.

55. During the cross-examination it appeared that United has previously obtained certificates to make sales from some of the uncertificated facilities. For example, although United seeks to have its Weeks Island pipeline certificated in this proceeding, the Commission issued on June 26, 1968, an order in *United Gas Pipe Line Co.*, 39 FPC 1029, certificating a sale to Humble Oil & Refining Company from that pipeline. Moreover, despite the fact that the order specifically restricts deliveries of gas to Humble to a maximum of 3,500 Mcf per day, Exhibit 17 indicates that United has delivered up to 7,010 Mcf per day to Humble at that point. Likewise, the Commission has apparently certificated some facilities near the lateral line serving Baton Rouge, but United's witness was not clear as to what those facilities were or whether they are still used for the purpose for which they were originally certificated.

56. United should also include in Exhibit K a separate break-down of the facilities comprising the 24 interconnections at which interstate gas may be injected into the Lafayette and New Orleans facilities. Inasmuch as United claims that increasing quantities of interstate gas will be needed to supply the Southern Louisiana market, it should explain where the increased quantities of interstate gas

will be obtained and which of the 24 interconnections will be used for that purpose.

CERTIFICATION ISSUES

(1) *Introduction*

57. As set forth in its opinion in *Kansas Pipe Line & Gas Co.*, 2 FPC 29 (1939), the Commission has considered five primary factors in determining whether a certificate of public convenience and necessity should be issued. Those five factors are whether a market for the gas has been shown, whether there is a gas supply available to serve the proposed markets for a time sufficiently long to justify the construction of the facilities, whether the facilities proposed to be constructed are adequate from an engineering point of view, whether the proposed sales will return sufficient revenues to enable the applicant to recover the cost of service involved in rendering the proposed sales and services, and whether the applicant will be able to obtain the financing necessary to construct the proposed facilities. United's application in this proceeding is unusual in that the facilities for which it seeks a certificate have already been constructed, the markets have already been attached, the gas is already flowing, the facilities have already been financed, and proposed rate increases covering the sales involved are presently pending before the Commission.

58. Although the Lafayette and New Orleans Districts contain existing pipeline systems now in operation, those systems were constructed many years ago and have been operated as independent intrastate pipeline systems entirely separate from United's integrated interstate system over which the Commission exercises jurisdiction. Therefore, when United filed its application requesting that the

Commission issue a certificate covering all the facilities, resales, and services being rendered in its Lafayette and New Orleans Districts, it was obligated to present evidence showing that the attachment of those facilities, resales, and services to the interstate pipeline system is required by the public convenience and necessity. While we recognize that with existing facilities certain conventional data may be omitted, we note certain deficiencies in the record as outlined below which should be the object of an additional evidentiary presentation.

(2) *Markets*

59. United's market evidence consisted of a tabulation of its resale and direct-sale customers showing the largest volumes which they have taken on non-coincidental peak days, but United failed to show what volumes it is obligated to deliver to its customers under the most recent service agreements and direct-sale contracts. Since United is operating under the curtailment provisions of its tariff at the present time,[14] any certificate issued should contain volumetric limitations in accordance with the Commission's Statement of Policy in order No. 431 issued April 15, 1971, in Docket No. R-418. Therefore, in the remanded proceeding United should present as part of its market evidence copies of the service agreements which it has most recently negotiated with its resale customers. If United's gas supply deficiency prevents it from proposing to deliver contractual volumes to its resale and direct-sale customers, it should make a separate tabulation of the actual volumes it expects to deliver in light of its current gas supply situation.

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[14]United is currently involved in a curtailment proceeding before the Commission in Docket No. RP71-29, *et al.*

(3) *Gas Supply*

60. Since United is now curtailing deliveries to its customers, the Commission assumes that United has a deliverability of less than one year, but United did not present any evidence which would permit the Commission to evaluate the impact on the existing interstate customers that would result if the Commission were to certificate the service proposed to be continued in the Lafayette and New Orleans Districts. Therefore, United's gas supply evidence should show the volumes of gas which will be available to serve the existing interstate markets with and without the markets in the Lafayette and New Orleans Districts. Inasmuch as United claims that a much greater quantity of interstate gas will be needed to serve the Lafayette and New Orleans Districts within the next two or three years, its deliverability exhibit should project the impact on the existing interstate market if it were to be permitted to provide service from its interstate system to all of its customers in the Lafayette and New Orleans Districts.

61. United's shortage of gas raises the possibility that authorization of markets in the Lafayette and New Orleans Districts will result in the taking of disproportionate volumes of gas from existing industrial customers now being served with the gas supply previously committed to serving only interstate markets. Therefore, United's deliverability study should show to what extent the deficiencies in gas supply alleged for the Lafayette and New Orleans Districts are based upon the requirements of industrial customers as compared with the needs of residential and commercial customers.

62. A question in this proceeding is whether customers who were being served from what has previously been an

entirely separate intrastate system with its own gas reserves should now be allowed to continue to purchase gas from a gas supply which presumably was not committed to serving an uncertificated system and its customers.

(4) *Engineering Feasibility*

63. United's evidence consisted of flow diagrams showing net movement of gas on only an annual basis. The Commission has compensated for United's failure to present peak-day flow diagrams by examining the diagrams for January 6, 1970, which were received in evidence as Item E and by taking official notice of the flow diagrams for the peak day of March 3, 1971. At the remanded hearing the peak-day flow diagrams for March 3, 1971, should also be received in evidence as an item by reference to the Commission's files.

64. The Commission normally evaluates engineering and economic feasibility on the basis of the third-year volumes of gas to be served in a proposed market. Since United has previously served the Lafayette and New Orleans Districts with gas from fields located fairly close to the markets, it is essential that United show how increasing quantities of gas can be introduced into the Lafayette and New Orleans facilities so that the Commission will know whether additional facilities will have to be constructed to transport gas from interstate gas sources to market in the Lafayette and New Orleans Districts.

(5) *Economic Feasibility*

65. To the extent that United addressed itself to the question of economic feasibility, it shows that the certificate should be denied because it claims that the direct-sale

customers which are presently attached to the Lafayette and New Orleans facilities are noncompensatory since the rates in some of their contracts with United are so low that they do not cover United's average cost of purchased gas.

66. The Commission has for many years conditioned certificates to require pipeline companies and industrial customers to modify their contracts to remove "escape" clauses therefrom.[15] There have been instances where the Commission conditioned a certificate authorizing the expansion of a pipeline company's existing system upon the procurement of firm contracts with industrial customers to assure the economic feasibility of the proposed expansion.[16] In the remanded proceeding, if it is determined that the service United is rendering to industrial customers is non-compensatory, and if the certificate were otherwise required by the public convenience and necessity, the Commission could consider granting the certificate conditioned to assure that the allocable cost of service to the direct industrial customers is recovered.

67. Before the Commission can determine economic feasibility, however, United should present an economic feas-

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[15] In Houston Texas Gas & Oil Corp., 16 FPC 118 (1956), *aff'd sub nom. Florida Economic Advisory Council v. F. P. C.*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958), the Commission conditioned the certificate issued to require removal of clauses in contracts which would have permitted electric companies to pay transportation rates based on the competitive cost of oil. In *Northern Natural Gas Co.*, 22 FPC 164 (1959), *aff'd sub nom. Minneapolis Gas Co. v. F. P. C.*, 278 F.2d 870 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960), the Commission required a pipeline company to remove from its direct-sale contracts with electric companies clauses which would have permitted the electric companies to stop purchasing gas if the price of coal should become cheaper than the cost of gas.

[16] *Midwestern Gas Transmission Co.*, 22 FPC 775 (1959, *aff'd sub nom. Michigan Gas and Electric Co. v. F. P. C.*, 290 F.2d 374 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 897 (1961), *Northern Natural Gas Co.*, 30 FPC 859 (1963), and *Southern Natural Gas Co.*, 31 FPC 789 (1964).

ibility study showing the cost of service allocable for the Lafayette and New Orleans Districts. Such a study should show the deficit, if any, which would result from serving both resale and direct-sale customers in the Lafayette and New Orleans Districts.

68. Gulf States Utilities Company presented Exhibit 24 which indicates that United's full cost of service in the entire New Orleans Division (which includes both the Lafayette and New Orleans Districts as well as United's *interstate* transmission lines) ranges from 3.4 to 4.5 cents per Mcf exclusive of the cost of purchased gas. However, Gulf States' exhibit needs to be refined so as to allocate only to the Lafayette and New Orleans Districts that portion of the cost of the interstate pipelines which should appropriately be assigned to those areas. Despite the unrefined nature of its evidence, Gulf States shows that the rate in its direct-sale contract with United fails to pay United's full cost of service associated with serving Gulf States' generating plants. The Commission must determine whether to certificate direct sales which do not pay their full share of the cost of service.

69. In presenting its economic feasibility evidence in the remanded proceeding, United may utilize the same rates of return and depreciation which were employed in its last rate increase filings in Docket No. RP72-75. Use of such rates in a certificate case is illustrative of the highest costs the existing and proposed customers may have to pay and makes its possible to test the economic feasibility of proposed new service in light of rates being proposed for service to existing customers.

70. The foregoing discussion shows that the evidence

in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity. We shall, therefore, remand the proceedings to the Presiding Examiner as hereinafter provided. Our determination that the Commission has jurisdiction over United's operations in the Victoria and New Orleans Divisions, however, requires that we address ourselves to the status of United's existing services in these Divisions pending the Commission's determination of the certificate issues.

71. In the absence of the issuance of a certificate at this time, we have two alternatives with regard to the existing service provided by United pending a Commission determination on remand: (1) the immediate termination by United of deliveries into the systems in question, or (2) the continuation of deliveries of interstate gas into these systems on an emergency basis pending final disposition of this matter.

72. Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970-71 heating season and, based on projections for the 1971-72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District. Moreover, the record does not disclose the impact on United's customers in the Victoria and New Orleans Divisions of an abrupt discontinuation of interstate deliveries into these systems.

73. In view of these facts, we believe that the public interest may best be served by continuation of United's

service to prevent the undue hardship that might result from an immediate termination of interstate deliveries. We shall, therefore, authorize the continuation of such existing deliveries of interstate gas into the Victoria and New Orleans Divisions on an emergency basis, subject to the condition that these facilities be operated as part of United's integrated interstate system fully subject to our exclusive jurisdiction. Thus due to the current shortage of gas on United's system, deliveries to customers in these Divisions shall be subject to the curtailment provisions of United's tariff, pending the Commission's decision in the remanded proceedings, and all other matters, rate or otherwise, shall be subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder.

74. We are aware that the finding of jurisdiction over the New Orleans and Lafayette Districts raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems. We do not consider this question herein. To assure equitable treatment we will permit those producers selling directly to facilities herein declared jurisdictional to file their contracts pursuant to Paragraph 12 of Docket No. R-389A for consideration by this Commission without prejudice to their right to challenge this opinion on appeal and without admitting that this Commission has jurisdiction over the sales in question.

75. In *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co.*, Fifth Circuit No. 71-2550, decided Jan. 14, 1972, ____ F.2d ____, the court held that "* * * The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction" (Slip Op., p. 29). Since we respectfully disagree with the legal

conclusion drawn by the court, we are constrained to consider the question of whether this Commission is precluded from making an independent decision based upon the record in the case before us.

76. We have examined the basic authorities on *res judicata* and estoppel by judgment and fail to find any authority for the proposition that an administrative agency charged by Congress to determine its jurisdiction in accordance with the Administrative Procedure Act and the Natural Gas Act must terminate its proceedings when a court, in a collateral suit, reaches the jurisdictional question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

77. We have considered such cases as *Commissioner* v. *Sunnen*, 233 U.S. 598 (1948), wherein the Supreme Court held the doctrine of estoppel inapplicable to subsequent relitigation by an agency of the same question decided adversely to it in court.

78. In *Otis & Co.* v. *S. E. C.*, 176 F.2d 34 (D.C. Cir. 1948), *rev'd per curiam*, 338 U.S. 843 (1949), SEC brought a suit in the District Court to require certain parties to testify in a concurrent administrative proceeding. Upon the court ruling against SEC, Otis then sought injunctive relief to terminate the administrative hearings. The District Court dismissed the suit and the Court of Appeals reversed. The Supreme Court upheld the District Court dismissal, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *supra*.

79. In *Federal Water and Gas Corp.*, 188 F.2d 100 (3rd Cir. (1951), the SEC approved a plan which was ultimate-

ly affirmed in the Supreme Court. On subsequent order, the Court of Appeals attempted to modify the agency's order, but the Supreme Court prohibited this. This decision is not in point.

80. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), has no application to this situation since there was no question of forum or primary jurisdiction. The same is true of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

81. In *U. S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), the Advisory Board of Contract Appeals held hearings in which the company asserted claims against the Atomic Energy Commission for additional compensation and time extension. Subsequent to the decision, the respondent brought suit for breach of contract in the Court of Claims which ruled that the factual issues in the controversy should be resolved in a judicial trial. The Supreme Court held that the Court of Claims could review the administrative record, but could not retry the issues, which had properly been before the agency and which the parties had an adequate opportunity to litigate. This case is instructive, since it reflects the deference to administrative proceedings which we have asserted.

82. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Federal Power Commission issued a license to construct and operate a hydroelectric project. The City petitioned the Court of Appeals on the ground that the City could not act in opposition to a State policy. The Court of Appeals affirmed the Commission's order and the Supreme Court denied certiorari. In regard to the bond issue, the State court enjoined the City and Supreme Court

of Washington affirmed. The U.S. Supreme Court in granting certiorari stated that the bond validation suit was an impermissible collateral attack upon the final judgment of the Court of Appeals in the initial proceeding. There, again, the administrative proceedings were held to be primary.

83. We conclude that we are not precluded from reaching a decision by the action of the court's opinion. The *LP&L* case is a collateral attack on the Commission's jurisdiction to hear and to decide the case presented in Docket No. CP71-89. Counsel for the Commission, authorized and directed to appear for the Commission as intervener in the collateral suit, asserted the primary jurisdiction of this Commission to decide the case; — the Commission did not — and could not — take a position on the merits until this decision was reached. Therefore, the instant decision is the first opportunity we have had to decide the issues entrusted to us by the Congress through the Natural Gas Act, subject to court review. We thus feel constrained to state for the review of any Court of Appeals and the Supreme Court, if certiorari be granted, the findings and conclusions of law in the order herein entered.

The Commission finds:

(1) Applicant, United Gas Pipe Line Company, a Delaware corporation having its principal place of business in Shreveport, Louisiana, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order of January 20, 1942, in Docket No. G-216, 3 FPC 3.

(2) United has introduced significant quantities of in-

terstate gas into its Lafayette and New Orleans facilities and has commingled uncertificated and interstate gas supplies since 1965.

(3) The Federal Power Commission has jurisdiction under the Natural Gas Act and particularly Sections 2(7) and 1(b) thereof over the facilities, transportation, and sales for resale of natural gas by United by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

(4) United has failed to present sufficient evidence as required by the Commission's Regulations to permit the Commission to evaluate the factors entering into determining whether the certificate of public convenience and necessity requested by United should be issued or granted with conditions.

(5) The proceeding should be remanded to the Presiding Examiner in order to permit United to satisfy the evidentiary deficiencies which have hereinbefore been specified.

(6) United's sales and services within the Victoria and New Orleans Divisions should be continued on an emergency basis pending further order of the Commission in the remanded proceedings.

The Commission orders:

(A) The proceeding in Docket No. CP71-89 is hereby remanded to the Presiding Examiner for receipt of additional evidence to overcome the deficiencies hereinbefore specified.

(B) Within 45 days after issuance of this order United shall file with the Commission and serve upon the Presiding Examiner, all parties to the proceeding, and the Commission's staff the testimony and exhibits required to satisfy the evidentiary deficiencies hereinbefore specified.

(C) Within 30 days after the filing and service of United's evidence all other parties and the Commission's staff shall file with the Commission and serve upon the Presiding Examiner, United, and other participants any evidence which they may wish to present in support of their positions.

(D) Service to all customers in the Victoria and New Orleans Divisions shall be continued on an emergency basis, on condition that United's facilities therein be operated as part of its integrated interstate system, subject to curtailment under United's tariff and subject to the Natural Gas Act and all rules, regulations, and orders issued thereunder, pending the issuance of a final decision in this proceeding.

(E) The hearing in the remanded proceeding shall commence on April 25, 1972, at 10:00 a.m. (EST) in one of the Commission's hearing rooms, 441 G Street, N. W., Washington, D. C. 20426.

(F) The motions for oral argument made herein are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Secretary.

CARVER, Commissioner, *dissenting:*

I dissent from so much of this opinion as relates to the New Orleans District (or Green System-East) portion of United's facilities in the State of Louisiana.

To understate the matter considerably, this is a most unusual case. The applicant is a major pipeline company, long recognized as a "natural gas company" for the purposes of regulation under the Natural Gas Act, and a party to numerous, probably hundreds, of proceedings before this Commission. For more than a decade, however, it has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.

Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, Florida Parishes was finally concluded in 1966 and four years is a long time for error to surface in this fashion. Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipe-

line capacity needed markets.[1] But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1. Stated otherwise, at 1970 levels of delivery, United's available reserves could meet its customers' needs for less than five years. Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan "would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts." *United Gas Pipe Line Company*, ____ FPC ____ (Opinion No. 606, October 5, 1971).

I did not participate in the above proceeding, but dissented to its reaffirmation on rehearing (Opinion No. 606-A, December 3, 1971), both generally and with specific reference to the above-quoted holding.[2] My reservations were well-founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much (see par. 51, *supra*).

The preceding observations are merely descriptive of

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[1]Based on data in United's 1970 Annual Report and Exhibit 34 of the record, direct industrial sales represent nearly 68% of the volumes delivered by the New Orleans District (138.4 out of 203.7 million Mcf).

[2]The powers of this Commission are parallel in all essential respects to those conferred upon the FCC by the Communications Act of 1934 (47 U.S.C. 301ff), as to which the Supreme Court has said: " . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Regents of the University System of Georgia v. Carroll, et al.* (1950) 338 U.S. 586, 600-602.

the general setting and the dominant motivations that surround the proceeding. It is necessary to state them here because they are not otherwise exposed to public view. They explain in considerable part my refusal to join in what the Commission does today, but they are buttressed by a broad array of more specific objections I have to the majority opinion. Ordinarily, I should feel compelled to document those legal, policy, and procedural differences in the detail they merit. I refrain from doing so, however, because the issues involved have passed from this arena. What is done here is a useless thing and one that portends difficulty for this Commission in the future.

While this proceeding was pending, some of the parties engaged in a race to the courthouse with this Commission in hot pursuit. *Louisiana Power and Light* v. *United Gas Pipe Line Company*, cited par. 75, majority opinion *supra*, constitutes a full adjudication by a court of competent jurisdiction of the very issues here considered. Until that judgment is vacated through available appellate resort, this Commission is without authority to issue any valid directive inconsistent therewith.

Whether we denominate the principle involved as *res judicata*, estoppel by judgment, or some other term, every lesson of the law tells us that we are bound by the opinion of the Fifth Circuit Court of Appeals unless and until its judgment is vacated through proper judicial process. The conditions for application of that principle could not be more clearly present: The issues are identical; the essential parties are the same. This proceeding merely renews a duel that has already been "fought out . . . in litigation with the other party." *Commissioner* v. *Sunnen*, 333 U.S. 598 (1948). (This case is not the same as *FPC* v. *Amerada*

Petroleum Corp., et al., 379 U.S. 687 (1965), because it was there admitted by the court below that a new claim was being litigated in the second action. By contrast, the order being issued here is in head-on collision with the Fifth Circuit's holding on the status of United's Green System-East.)

This conclusion is the more compelling because of the special facts surrounding the earlier judicial proceeding. As the majority account amply discloses, this Commission was not an original party thereto, but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction.[3] Knowingly and purposefully, it submitted to the jurdisdiction of the courts which have so far considered the matter. "An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment," *Otis & Co.* v. *SEC*, 176 F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4), and may be enjoined from undertaking a subsequent proceeding to relitigate the same controversy. An attack on a prior judgment will also be rejected, "even though it was based on a patently erroneous view of the law." *In re Federal Water and Gas Corp.*, 188 F.2d 100, 105 (CA3, 1951), cert. den. *sub. nom. Chenery Corp. et al.* v. *SEC*, 341 U.S. 953 (1951).

Res judicata concepts are controlling as to jurisdictional questions as well as factual matters bearing on the merits,

[3]In this respect, the majority opinion fails to make the proper distinction between the parallel and equal doctrines of primary jurisdiction on the one hand and *res judicata* on the other (par. 83). Primary jurisdiction does not constitute an *ouster of power* to hear a case; it merely provides a working formula to establish *priority of consideration* where substantive issues in the proceeding are within the expert competence of the agency. *Res judicata* is an effective bar to rehearing of an issue already litigated. As presented here, the ultimate distinction is between an alleged *collateral* attack upon administrative jurisdiction and a *direct* attack upon a judgment already rendered.

Stoll v. *Gottlieb*, 305 U.S. 165, 172 (1938), and enforces repose "not only respects matters actually presented . . . in the original proceeding, but also as respects any other available matters which might have been presented to that end" (Citations omitted), *Chicot County Drainage District* v. *Baxter State Bank, et al.*, 308 U.S. 371, 378 (1940).

Administrative proceedings are subject to the same principles as judicial bodies in this respect, and there is no doubt but what the courts would have protected our process had the issues herein been decided initially by this Commission and allowed to become final, *U.S.* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); nor will the state courts be permitted to retry issues previously determined by the Commission acting within its proper scope of authority. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

This is a sword that must be allowed to cut both ways if administrative and judicial authority are to respond in the complementary and concurrent manner that our complex society requires. By our intervention in a private law suit, we have already lent the weight of sovereign Federal authority to one side of the balance. Having failed to carry that forum, it is proposed to flout the court's mandate, an action which is as fruitless as it is irresponsible.

JOHN A. CARVER, JR.
Commissioner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:
John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
Pinkney Walker, and Rush Moody, Jr.

United Gas Pipe Line Company

Docket No. CP71-89

OPINION NO. 610-A

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties[1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

[1]New Orleans Public Service Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation of alleged violations of "the Natural Gas Act and of Gas Reserves" and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc. asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described

gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the De Large Field gas does not enter the Green System-East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission[2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This

[2]Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order that deliveries by United be continued on an emergency basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sale contracts. In authorizing United to continue its deliveries on an emergency basis we have, however,

imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(e) of the Natural Gas Act against any proposed construction of extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of public convenience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7/71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED GAS PIPE LINE COMPANY

Docket No. CP71-89

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the

document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U. S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-

[1] ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. . . "

Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidental amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

JOHN A. CARVER, JR.
Commissioner

APPENDIX C — MISCELLANEOUS

Motions

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

VERSUS

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA POWER & LIGHT COMPANY
FOR REHEARING IN BANC
IN NO. 72-1714

Petitioner, Louisiana Power & Light Company, respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission in the above titled cause, and in support of this petition for rehearing *in banc* represents to the Court as follows:

We reserve our argued position as to each of the points raised in our petition for review, but in this petition for rehearing *in banc* address ourselves solely to that feature

of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect legal principles.

Thus, this petition is devoted to convincing this Court that it has erred in failing to apply the Substantial Evidence Test to the Federal Power Commission's determination that the Green System-East is a part of United's integrated interstate pipeline system and that the amounts involved are not minimal. By this failure the Court has failed to preserve uniformity in its decisions with respect to a question of exceptional importance. Therefore, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F. 2d 326 (5th Cir. 1972), this Court held that the channel of constant flow was intrastate in nature, and that any interstate gas which had been introduced into Green System-East was so minimal in amount that federal jurisdiction had not attached. Although the Supreme Court of the United States did reverse this Court on the question of whether it was necessary to await the Commission's own determination of jurisdiction, *the Supreme Court did not reverse those substantive holdings of this Court.* Rather, the Supreme Court simply ruled that this Court should defer to the FPC for the initial determination of jurisdiction subject to "review of the FPC decision . . . in due course pursuant to §19(b) of the Act, 15 U.S.C. §717(b)." *Federal Power Commission v. Louisiana Power & Light Co.*, ... U.S. ....., 92 S. Ct. 1827, 1842 (June, 1972).

Section 19(b) of the Natural Gas Act expressly provides

for the applicability of the Substantial Evidence Test to such proceedings. Identical language in the Federal Power Act was interpreted by the Supreme Court in 1972 as importing the Substantial Evidence Test into review of Federal Power Commission proceedings. *Federal Power Commission v. Florida Power & Light*, 404 U.S. 453, 92 S. Ct. 637 (January, 1972).

On the basis of the same evidence before this Court last year, the evidence upon which the Court then concluded that Green System-East was intrastate, the Court has now ruled that as a matter of law the Green System-East is interstate. This is not the logical consequence of the Supreme Court's ruling. It is a logical consequence of a misapplication of fundamental principles of administrative law.

The Court has this time sustained a finding that the system is interstate on the ground that there is a rational basis to support the Federal Power Commission's finding:

> "Exercising our limited review as opposed to interpreting *de novo*, we find that we may not overturn the Commission's holding. We cannot say that there is no reasonable basis for the FPC's position. See 4 Davis, *Administrative Law Treatise* §30.05." Slip opinion p. 19.

Davis, the only authority cited by the Court, in the place cited by the Court, discusses this "Rational Basis Test" as a device sometimes used by Courts to avoid a determination of what is a question of fact and what is a question of law. If the Court can avoid making such a distinction, it might be argued that it need not determine whether there is substantial evidence to support the agency's action.

This approach to the Rational Basis Test is not sanctioned by the United States Supreme Court. Under decisions of the Supreme Court, there must be both substantial evidence *and* a rational basis to sustain an agency's action: "Judicial review of this conclusion is limited to consideration of whether it has a rational basis *and is supported by substantial evidence.*" *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962), emphasis added.

Avoiding a determination of whether there is substantial evidence to support the agency's determination denies to LP&L the very review which the Supreme Court reserved to it under §19(b) of the Natural Gas Act, 15 U.S.C. §717(b). It also violates the mandate of the Administrative Procedure Act that "the reviewing Court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ." and that the Court "in making such a determination shall review the whole record. . . ." 5 U.S.C. §706.

The approach taken by this Court this time is directly contrary to the leading case of *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474 (1950). There the Court discussed at length the dissatisfaction with the finality accorded by some Courts to agency decisions "when the reviewing Court could find in the record evidence which, when viewed in isolation, substantiated. . ." the agency's findings. 340 U.S. 478. The case epitomizing the abuse which Congress sought to correct was *N.L.R.B. v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942), where the Court sustained an agency's action on the ground that "upon an examination of the record we cannot say that the findings

of fact of the Board are without support in the evidence." 316 U.S. at 107, quoted in discussion by the Supreme Court of the background of the APA in *Universal Camera*, 340 U.S. at 486. Sustaining an action on the ground that it is "not without support in the evidence" is the same as sustaining it on the ground that it is not without a "reasonable basis." Therefore, the approach taken by this Court this time is identical to the approach which the Supreme Court ruled impermissible under *Universal Camera*.

In *Universal Camera* the Court ruled that provisions by Congress for the review of administrative determinations must be read in conjunction with the provision of the Administrative Procedure Act requiring that the Court strike down such agency action if not supported by substantial evidence on the record as a whole:

> "Whether or not it was ever permissible for Courts to determine the substantiality of evidence supporting a . . . decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 U.S. at 487-488.

A finding that there is a reasonable basis for the FPC's position does not meet the test of *Universal Camera*. To say that there is a reasonable basis without finding that there is substantial evidence is merely to say that there is *some* evidence from which an inference may be drawn in support of the agency's finding. If that is all the evidence there is, then this Court's duty under the Administrative

Procedure Act is to strike down the FPC's determination, not to avoid the issue under a claim of limited review. "Reviewing Courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." *Universal Camera*, 340 U.S. at 490.

The choice before the Court this time was not between deciding the matter as though it were before the Court *de novo* or sustaining the FPC's action if some reasonable basis could be found. The choice was to sustain or strike down the action according to *whether there was substantial evidence.* The failure of the Court to discuss any substantial evidence which warranted a different conclusion from that which this very Court had reached in 1972 demonstrates that the Court "cannot conscientiously find that the evidence supporting that decision is substantial." *Universal Camera*, 340 U.S. at 488. Indeed, the statement by the Court that because of its "prior holding" it is "almost certain" that the Court would not reach the same conclusion as the FPC if the determination were less limited than the "reasonable basis" test, is an admission by the Court that no new substantial evidence has been developed sufficient to sustain a finding that the system is interstate.

Accordingly, we urge that a rehearing *in banc* be ordered so that this Court may exercise the responsibility placed in its keeping by Congress to review the actions of administrative agencies, and by so doing restore to its decisions uniformity on this question of exceptional importance.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOS. 72-1714, 72-1715, 72-1720
72-1721, 72-1724, 72-1784
72-2185 and 72-2188

LOUISIANA POWER & LIGHT COMPANY, ET AL
Petitioners

versus

FEDERAL POWER COMMISSION
Respondent

PETITION OF
LOUISIANA GAS SERVICE COMPANY
FOR REHEARING IN BANC
IN NO. 72-1715

Petitioner, Louisiana Gas Service Company (LGS), respectfully petitions this Honorable Court for a rehearing *in banc* of its petition to review and set aside opinions and orders of the Federal Power Commission. In support of this petition LGS makes the following representations:

LGS reserves its argued position as to each of the points raised in its petition for review, but in this petition addresses itself solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon application of incorrect principles of law.

The thrust of this petition is that the Court has erred in ruling that Congress has not excluded the Green System-East from the jurisdiction of the Federal Power Commission by the enactment of the Hinshaw Amendment to the Natural Gas Act. By so ruling the Court has failed to maintain a uniformity in its decisions in a proceeding involving a question of exceptional importance. Hence, we respectfully suggest that this is a matter where a rehearing *in banc* is appropriate.

In *Louisiana Power & Light Company v. United Gas Pipe Line Co.*, 456 F.2d 326 (5th Cir. 1972), after pointing out that the Green System-East is physically located in and functions entirely in Louisiana, a panel of this Court ruled that its regulation is "substantially and essentially a localized matter committed to Louisiana jurisdiction". 456 F.2d at 339-340. Section 1(c) of the Natural Gas Act (the Hinshaw Amendment) exempts by operation of law from the jurisdiction of the Commission anyone who meets the following requirements:

1. Any person engaged in transportation or resale of natural gas in interstate commerce,

2. Where such gas is received by such person from "another person" within or at the boundary of a State,

3. If all the natural gas so received is consumed within the State, and

4. The activities of such a person are subject to regulation by the State.

It is clear from this Court's 1972 decision that the Green System-East is within the purpose of the Hinshaw

Amendment as a matter of essentially local concern. The essential question before the Court is whether the literal language of the Hinshaw Amendment *compels* a departure from this Court's earlier decision.

We submit that the construction given by this Court to the Hinshaw Amendment is inconsistent with its treatment of the entire Green System as a single unit for the purpose of determining the existence of federal jurisdiction. The crucial part of the Court's reasoning that demonstrates the inconsistency is as follows:

> 'Thus, under §1(c) it is not sufficient that all the gas transmitted through a given facility be consumed within a given state, or that a facility be subject to state regulation which is at least as extensive as that which the Commission would administer. Rather, the facility must be controlled ("used") by a "person" who received gas from "another person" at or within the state lines. It follows that a facility cannot be exempt if the "person" who receives the gas is the same "person" who transmits the gas into the facility in the first instance. In effect, the requirement of a "person-to-person" exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which operated by the same "person." ' Slip Opinion, pp. 23-24.

The fatal flaw in the Court's reasoning lies in its gloss upon the statute to limit the Hinshaw Amendment to *receipt from another person engaged in transmission at the point of interconnection with the exempt facility.* One searches the statute in vain to find any requirement that the exempt facility connect *directly* with another person. So long as the operator of the facility claimed as exempt does in fact receive the gas transported in that facility from another person within the state and the gas is

"*ultimately*" consumed within that state, the Hinshaw exemption is operable.

This time the Court has erred in making a faulty extrapolation from the legislative history of the Hinshaw Amendment. The fact that as a matter of history the occasion which gave rise to the passage of the Hinshaw exemption was one involving the acquisition of gas by a local distributor from one engaged in interstate transmission does not of itself create any limitation in the statute to such circumstances. The test of the limitation of the scope of a statute is that meaning consistent with both its language and its purpose. The language of the Amendment is not limited to instances where acquisition is from those engaged in transmission. It applies where the gas is acquired "from another person within or at the boundary of a State" whenever such gas is "ultimately consumed within such State." The declared purpose of the Amendment is to exempt from FPC regulation those matters primarily of local concern. If a facility which receives its gas from another person engaged in interstate transmission is primarily of local concern, then the same is true a *fortiori* of one who acquires from another person engaged in the production of such gas.

In this case there is no disputing the fact that United is not a producer and purchases all of its gas from *other persons*. The record is perfectly clear that United does not furnish itself any gas or bring any gas into the Green System-East from outside Louisiana, and all of the gas is furnished to United by "other persons", i.e., Texaco, Shell, Gulf, *et al.* The fact that United itself operates the facility by which the gas is transmitted from the other persons who are the producers to the facility which transmits the gas for ultimate consumption within the State does not

alter the status of the facility which transports the gas to interstate consumers under the Amendment.

The construction given by this Court is not necessary to avoid the danger of extending the statutory exemption to local branches of a single interstate system formed by the expedient of an interstate transmitter's placing its statewide delivery systems under the control of a wholly-owned subsidiary. Such bad-faith efforts are defeated by a reasonable construction of "another person" to exclude entities formed for that purpose. The gloss added by the Court to the Amendment to require that there be another person *at the point of delivery* adds nothing to the protection afforded by the language of the Act itself.

Thus, in this case where the operator of a facility used to transport gas for ultimate consumption within a State does acquire the gas from other persons who produce it, the Hinshaw exemption is applicable. The test under the statute is ultimate consumption, not the intermediate mode of transportation. That regulation of the facility in question is a matter primarily of local concern has already been determined by the Court. This is a matter of exceptional importance, and the Court should accordingly grant a rehearing *in banc*.

Respectfully submitted,
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Flow Diagram

EXHIBIT 29